CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 316

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, ET AL., PETITIONERS

vs.

PAUL R. HEITMEYER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 24, 1939
CERTIORARI GRANTED OCTOBER 16, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. —

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, ET AL., PETITIONERS,

vs.

PAUL R. HEITMEYER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Proceedings in United States Court of Appeals for the District of Columbia, Case No. 6762	1	1
Opinion, Miller, J.	1	1
Judgment	13	14
Petition for stay of further proceedings, etc.	14	14
Order granting petition for stay	18	16
Motion to vacate stay order	19	17
Motion to deny petition to vacate stay order and answer	23	20
Opposition of Commission to motion to deny petition to vacate stay order	33	25
Order granting motion to vacate stay order	39	29
Motion for rule to show cause	40	30
Opposition of Commission to "motion for rule to show cause"	46	33
Exhibits A to C—Notices as to hearings before Commission	51	36
Order denying motion for rule to show cause	55	38
Motion to stay mandate and to stay further proceedings before Commission	56	39
Order denying motion for stay	58	40
Proceedings in United States Court of Appeals for the District of Columbia, Case No. 7228	59	40
Bill of complaint for injunction filed in D. C. U. S.	59	40
Motion to dismiss bill of complaint in D. C. U. S.	70	50
Order of D. C. U. S. denying motion to dismiss	70	51
Order of Court of Appeals allowing special appeal—No. 2932, Original	71	51

	Original	Print
Proceedings in United States Court of Appeals for the District of Columbia, Case No. 7228—Continued.		
Opinion, Groner, J.	72	52
Judgment	75	54
Petition for rehearing	76	55
Opposition to petition for rehearing	97	64
Petition for writ of mandamus	99	66
Opposition to petition for writ of mandamus	102	68
Order denying rehearing, etc.	105	70
Order that a writ of mandamus issue	106	70
Order that entries respecting petition for writ of mandamus, etc., be transferred to original docket	107	71
Letter evidencing stay of issuance of writ of mandamus	108	71
Proceedings in United States Court of Appeals for the District of Columbia—No. 3102, Original	109	72
Petition to vacate order that a writ of mandamus issue	109	72
Opposition to petition to vacate order	113	74
Order suspending order that a writ of mandamus issue	115	76
Opposition to petition for writ of mandamus	117	76
Motion of respondents for leave to appear and be heard	135	85
Petition to vacate or further suspend order that a writ of mandamus issue	137	87
Opposition to petition to vacate or further suspend order	139	89
Order denying motions to vacate or further suspend order, etc.	141	90
Designation of record	142	90
Clerk's certificate [omitted in printing]	146	93
Order allowing certiorari		94

1 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeal from the Federal Communications Commission

James W. Gum and Clarence C. Dill, both of Washington, D. C., for appellant.

Hampson Gary, George B. Porter, Farmey Neyman, and Ralph L. Walker, all of Washington, D. C., for appellee.

Before ROBB, GRONER and MILLER, JJ., and WHEAT, District Judge

Opinion December 27, 1937

MILLER, J.: This is an appeal under Section 402 (b) (1) of the Communications Act of 1934[1] from a decision of the Federal Communications Commission denying the appellant's application for a permit to construct a new radio broadcasting station at Cheyenne, Wyoming.

The record shows that the Examiner who heard the case made findings of fact and arrived at conclusions therefrom to the effect that:

"The applicant is legally, technically, financially and otherwise qualified to construct and operate the proposed station. A need for additional service such as proposed by the applicant does exist in the area proposed to be served, and this application may be granted within the purview of Section 307 of the Communications Act of 1934 and the Regulations of the Commission with regard to quota, particularly Rule 6 (f).

"The record is silent as to any possible interference with other applications that may be pending from the same state or zone.

"The site at which the applicant proposes to construct and operate the station will conform to the Rules and Regulations of the Commission.

"The granting of this application would serve public interest, convenience and necessity.

The Examiner, therefore, recommended that the application of Heitmeyer, the appellant herein, be granted. At the same time he recommended denial of the application of the Wyoming Radio Educational Association, which he had theretofore consolidated for hearing with the appellant's application.

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1093; 47 U. S. C. A. § 402 (b) (1).

2 Approximately four months later, on May 1, 1936, the Commission entered its final order denying the application; making no findings and assigning no reasons therefor, but stating that it would "issue and publish at a subsequent date an opinion setting forth a statement of the facts appearing of record and the grounds for the decision [t]herein reached." On June 12, 1936, the Commission's decision was entered denying the applications of appellant Heitmeyer and that of the Wyoming Radio Educational Association. The latter applicant has not appealed from the decision of the Commission and is not concerned herein.

Section 402 (c) of the Communications Act provides that within thirty days after the filing of an appeal "the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved, and also a like copy of its decision thereon, and shall *within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it*, . . .". [Italics supplied.]

The language of the section quoted is ambiguous. The phrase, "within thirty days thereafter," indicates the intention of Congress that in case of appeal the Commission shall have additional time, totaling sixty days from the filing of the appeal, within which to prepare and file "a full statement in writing of the facts and grounds for its decision. . . ." The language immediately following, "as found and given by it," is susceptible of the interpretation that findings of fact should have been prepared prior to, or simultaneously with, the entry of its decision. Such an interpretation, however, would defeat the very purpose of Congress in allowing the additional thirty days—unless we are prepared to hold that the "full statement in writing of the facts" means something more than findings of fact. Such a holding would be without meaning because on appeal this court will have before it the full record of the evidence. A statement greater in detail than findings, and less in detail than the record itself, would serve no useful purpose. In order to reconcile the two quoted phrases, therefore, and to secure harmony and consistency in the requirements of the statute, it is necessary to interpret the language, "found and given by it," as requiring the Commission to publish something less than findings of fact previouse to or coincident with the entry of the decision. This can be accomplished by requiring it to file with its decision the grounds therefor and "a brief factual statement of the reasons" relied upon. As we said in Missouri Broadcasting Corporation v. Federal Communications Commission (No. 6869, decided December 6, 1937) — F. 2d) —, — App. D. C. —:

"The exact language is—file a full statement in writing of the facts and grounds for its decision *as found and given by it*. The six words we have emphasized imply, we think, that the grounds of decision and a brief factual statement of the reasons therefor have been previously given, that is, previously to the filing of the full statement, i. e., findings of fact, in this court."

This reasoning brings us to the further definite conclusion that ongress intended the "full statement in writing of the facts . . . found . . . by it," which the Commission is required to file within sixty days after the filing of the appeal, to be of the same general form and character as findings of fact well known trial courts. The words are properly susceptible of no other meang. Moreover, there is no reason to suppose that Congress intended establish a different rule of procedure, in this respect, for the Comunications Commission than for other similar governmental boards nd commissions which are engaged in quasi-judicial determinations. eaumont, S. L. & W. Ry. v. United States, 282 U. S. 74, 86; see also irginian Ry. v. United States, 272 U. S. 658, 674. This conclusion borne out also by the language of Section 402 (e), which limits reiew of decisions of the Commission to questions of law and then rovides that "findings of fact by the Commission, if supported by ubstantial evidence, shall be conclusive unless it shall clearly appear hat the findings are arbitrary or capricious." [Italics supplied.]

The questions which we must decide then, are: (1) Did the Comission make findings of fact? (2) If so, were they supported by ubstantial evidence? (3) Were they arbitrary or capricious? (4) o they support the conclusions of law reached by the Commission in s decision?

We find nothing in the record, or its index, which bears the title Findings of Fact." We do find a "Statement of Facts and Grounds or Decision." For convenience this "Statement" is set out—in so r as it is pertinent to this appeal—as follows:

STATEMENT OF FACTS AND GROUNDS FOR DECISION

* * * * * * *

"This proceeding arose upon the applications of Paul R. Heitmeyer for a construction permit to erect a new broadcast station Cheyenne, Wyoming, to operate on the frequency of 1210 kc, ith power of 100 watts, 250 watts local sunset, unlimited hours f operation; and of Wyoming Radio Educational Association for construction permit to erect a new broadcast station at Cheyenne, Wyoming, to operate on the frequency of 630 kc., with power f 500 watts, 1 kw. local sunset, unlimited hours of operation.

"The Commission was unable to determine from an examination f the applications that the granting thereof would serve public interest, convenience and necessity, and designated the same for public earing, pursuant to Section 309 (a) of the Communications Act f 1934, before an examiner appointed by the Commission. Notice f time and place of hearing was given the applicant and other nterested parties. Pursuant to said notice, the application was eard before an examiner on October 30, 1935. . . .

"Cheyenne, Wyoming, is the capital of the State, and is situated ear the southeast corner thereof. The population is 17,361 (census f 1930), and Fort Warren, an Army post situated just outside the

city, has an estimated population of 4,000. There are approximately 275 retail stores in the city, which did an estimated total volume of business of approximately seven million dollars in 1933. A number of jobbing establishments are located in the city, and railroad shops employ a considerable number of men. The surrounding territory is devoted principally to stock raising, and in some sections farming is engaged in.

4 WITH RESPECT TO THE APPLICATION OF PAUL R. HEITMEYER

"Paul R. Heitmeyer, applicant herein, testified that he is an American citizen by birth, and is therefore legally qualified to be a licensee. It appears that he has been actively engaged in various capacities in radio broadcasting for about fifteen years, and he is at present employed as Manager for Broadcast Station KLO at Ogden, Utah. The Commission is of the opinion that the applicant is technically qualified.

"*With respect to the financial qualifications of the applicant, he testified in the hearing on October 29, 1935, in the matter of his application for the Salt Lake City, Utah, station, the record of which was by stipulation incorporated into this record, that he estimated his financial worth to be $2,500.00. However, on July 15, 1935, he filed a sworn statement, as a part of this application, showing assets of $7,271, with liabilities of $474. Mr. Heitmeyer testified that a deposit had been placed to his credit by Mr. A. L. Glasman, who, it appears, is publisher of the Ogden Standard Examiner, and who also owned the controlling interest in Interstate Broadcasting Corporation, licensee of Station KLO at Ogden, Utah. The deposit was made by Mr. Glasman as a loan to Mr. Heitmeyer for the construction and operation of two broadcast stations, namely, the proposed station applied for herein, and another station at Salt Lake City, Utah (Docket 2980).*

"*The record discloses further that the applicant intends, in the event this application, and the one for a construction permit for the station at Salt Lake City, Utah, are granted, to form a corporation for each station and request the consent of the Commission to assign the licenses of said stations to the corporations. Under the terms of the agreement between Mr. Glasman and Mr. Heitmeyer by which the loan was made, Mr. Heitmeyer agreed to pay 6% interest on the principal, and to repay the loan within five years. However, in the event the loan is not paid under those terms, Mr. Heitmeyer is obligated to assign to Mr. Glasman 49% of the stock of the proposed licensee corporations. It also appears that the estimated cost of constructing the proposed station is $8,890, and the estimated monthly operating expenses are $1,525. The record is silent as to the estimated monthly revenue expected from the proposed station. Mr. Heitmeyer testified that he intends to reside in Salt Lake City, Utah, and leave the management of the requested station in Cheyenne to an employee and that he will visit the station ten or twelve*

days per month. He further testified that he had interviewed various residents of Cheyenne and found the sentiment favorable to having a radio station in that city, except that the publishers of the two newspapers very definitely objected to the proposed station.

"Upon the record before us, it is clear that the applicant personally is not financially able to construct and operate the proposed station, and that he intends to construct and operate the same, if permitted so to do, entirely on money which he has borrowed, without security, unless it be considered that the requirements for the formation of a new corporation, to whom assignment will be requested, and distribution of 49% of the stock to Mr. Glasman, is security for the loan. If it be so considered, then it is clear that the applicant has failed to show that he is financially qualified to construct and maintain a station of the kind and class applied for, since the loan is conditioned upon approval by the Commission of two applications when filed for assignment of license, which would in effect be a prejudging of those applications, which are not now before the Commission. Manifestly, the Commission is without power under the Communications Act of 1934 to act upon applications not presently before them, nor is it within the spirit of the Act to grant an application when it is apparent that the financial structure is dependent, not upon the applicant, but upon some future unpredictable happening. If it be considered that this stock is not security for the loan, then it is apparent that the applicant has made no sufficient showing of financial responsibility, since the physical equipment of this station may become subject to lien, foreclosure, and seizure by the lender, as a matter of law, in the event the loan is not repaid within the five-year period. On the record before us, the applicant must pay back $20,000, with interest at 6%, in five years, or something over $4,000 per year. The Commission is of the opinion, and so found, that the applicant has not made such a showing of his financial responsibility as would justify the Commission in granting the application applied for.

* * * * * * *

"The applicants, Paul R. Heitmeyer and Wyoming Radio Educational Association, both introduced considerable testimony relative to the need for a broadcast station in Cheyenne, the talent available there, and other matters, all of which has been carefully considered by the Commission, but as the showing made by both applicants precludes a grant of either application in any event, it is deemed unnecessary to discuss in detail such showing herein.

"After careful consideration of the applications, the evidence adduced at the hearings, the Examiner's Report and the exceptions thereto, and the oral argument, the Commission was of the opinion, and so found, that the public interest, convenience and necessity would not be served by granting the applications. Accordingly, on May 1, 1936, the Commission entered its final order denying the applications of Paul R. Heitmeyer and Wyoming Radio Educational Association,

effective at 3 A. M., E. S. T., September 29, 1936. The effective date of this order was later advanced to June 12, 1936." [Italics supplied.]

When we analyze this "Statement" we find, first, a history of the case; then a finding concerning Cheyenne, Wyoming, and surrounding territory; then a narrative recital of testimony given by appellant Heitmeyer, and his conclusion that he is legally qualified; then a tentative finding—"it appears that"—concerning Heitmeyer's past and present experience, followed by the Commission's conclusion that he is technically qualified; then three paragraphs concerning Heitmeyer's financial qualifications; then a paragraph in which the Commission states that it is unnecessary to discuss in detail the testi-
6 mony relative to the need for a broadcasting station in Cheyenne and the talent available there, because "the showing made by both applicants precludes a grant of either application in any event." Finally, there is a paragraph in which the Commission sets out its conclusion that the public interest, convenience and necessity would not be served by granting the applications.

It is to be noted, at this point, that the Commission has narrowed the case down to one question, i. e., Was the applicant financially qualified? Our inquiries, therefore, are similarly narrowed to a consideration of the three italicized paragraphs of the "Statement". Upon them the Commission's decision must stand or fall. Do they contain findings of fact, and, if so, are such findings supported by substantial evidence? Generally speaking the three paragraphs consist of a more or less indiscriminate commingling of arguments, speculations, statements of fact, narrative recitals of testimony and conclusions of law. Take as a whole, they cannot be said to constitute findings of fact such as are contemplated by the statute. Necessarily, therefore, they provide a highly unsatisfactory basis for appeal and thus defeat the purpose of the statute; which is to inform the parties and this court of the reasons for the Commission's action, with that high degree of certainty which may properly be expected from a group of administrative experts such as constitute the Communications Commission. Boss, et al. v. Hardee, (No. 6849, decided September 20, 1937) — F. (2d) —, — App. D. C. —, 65 W. L. R. 1031.

It is possible to segregate some sentences in these three italicized paragraphs which standing alone, and perhaps taken out of context, may be regarded as findings. It is possible, also, to spell out tentative or qualified findings from other sentences. Thus, the first sentence of the first italicized paragraph relates that Heitmeyer estimated his financial worth to be $2,500. The next sentence states that, however, he filed a sworn statement showing assets of $7,271, with liabilities of $474. The implication seems to be that there is a conflict in his testimony. Such a result cannot fairly be reached from the record. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442. The $2,500 about which Heitmeyer testified consisted of money in bank, an automobile, home furnishings and personal effects.

In addition he owned $4,000 worth of shares—fully paid for—in the corporation which operated Station KLO in Ogden, Utah. Moreover, the evidence at the hearing disclosed that the liabilities of $474 had been fully paid at that time. There was no conflict on this point and, if the two sentences referred to constitute a finding, the only part of it which is supported by the evidence is that Heitmeyer showed assets of $7,271. The last two sentences in the first italicized paragraph are supported by the evidence and the testimony there referred to could properly have been formulated into a finding.

The first three sentences in the second italicized paragraph, standing alone, constitute a finding which is supported by substantial evidence. The next sentence, relating to the cost of constructing and operating the proposed station, is supported by the evidence. A careful reading of the record shows that the next sentence, "The record is silent as to the estimated monthly revenue expected from the proposed station", is wholly unsupported by the record. Indeed, the Commission, in its brief, in reviewing the testimony of the witness Haller, quoted therefrom as follows: "A number of the Cheyenne merchants agreed to use time on the proposed station." The brief then states that "on the basis of such a survey the witness estimated that the merchants with whom he talked 'would probably spend within the neighborhood of $2,100 a month.'" In view of the fact that the Examiner made a correct finding upon the point—among other well prepared findings—the Commission's finding cannot be regarded as other than arbitrary and capricious. While the Commission is not bound by the findings of the Examiner, it is itself charged with the responsibility of making findings. Radio Commission v. Nelson Bros. Co., 289 U. S. 266, 285; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 53. In this case it would have profited from a more careful consideration of those which the Examiner prepared.

7

The last two sentences in the second italicized paragraph are supported by substantial evidence so far as they go, and could properly have been formulated into a finding of fact. The vice of the first sentence, however, is its incompleteness, which gives a shading of meaning not supported by the evidence. The evidence upon this point showed—and a finding might properly have been made accordingly—that Heitmeyer is the supervising director and manager of Station KLO at Ogden, Utah. His salary therefor is $300 per month and will continue, even though he secures the Cheyenne station and devotes approximately ten to twelve days a month to that station, as he expects to do. He has a contract with Mr. Glasman, the controlling stockholder in KLO, so providing and permitting him to engage in any other radio activities, provided he continues to keep KLO financially successful. If and when the permit and license are granted for the Cheyenne station he will have a resident manager for that station working under his direction.

The third of the three italicized paragraphs contains one sentence which, standing alone, constitutes a finding, as follows: "On the rec-

ord before us, the applicant must pay back $20,000, with interest at 6%, in five years, or something over $4,000 per year." This statement, except for the last six words, is supported by the evidence and is covered in part in the preceding paragraph. The last six words constitute a conclusion which is supported by no evidence whatever. There is nothing in the record to prove that Heitmeyer was required to pay anything, principal or interest, before the expiration of five years.

Otherwise, the third paragraph is devoid of anything resembling findings except (1) the first sentence, which is so involved with, and dependent upon, a question of law as to be in substance and effect a decision of the latter (Kansas City So. Ry. v. Albers Comm. Co., 223 U. S. 573, 591); and (2) the last sentence, which states the bald conclusion: "The Commission is of the opinion, and so found, that the applicant has not made such a showing of his financial responsibility as would justify the Commission in granting the application applied for." General statements of this kind, following the language of the statute, are not sufficient to constitute findings of fact such as are contemplated by the statute. Florida v. United States, 282 U. S. 194, 213. The language used indicates that this was
8 intended to be the "brief factual statement of the reasons" for the decision contemplated by the statute, given previously to the filing of the findings of fact. See Missouri Broadcasting Corporation v. Federal Communications Commission, supra. It serves that purpose very well, but does not constitute a finding of fact.

Assuming, for the purposes of this case only, that the three italicized paragraphs constitute findings, we conclude, in answer to our second and third questions, that some of them are supported by substantial evidence, some are not, and some are arbitrary and capricious. Our final question, then, is whether those findings which are supported by substantial evidence, themselves support the conclusions of law and the decision of the Commission. Otherwise stated, the final question is whether those findings support the conclusion that the applicant was not financially qualified to construct and operate the proposed station.

The argument set forth in the third italicized paragraph shows that the Commission decided the case upon the finding contained in the first three sentences of the second italicized paragraph. This is the only valid finding which could support the decision. It is first contended by the Commission that the appellant "intends to construct and operate the same [station] . . . entirely on money which he has borrowed. . . . " The finding does not support that contention. It shows instead that the appellant had some assets in addition to the borrowed money. Moreover, there is nothing in any of the valid findings which negatives the intent of the applicant to apply revenue from the station toward cost of operation. However, it does clearly appear that he had insufficient money to construct the station without that which he borrowed.

It is next contended by the Commission, as one of two alternative propositions, that appellant has failed to show his financial qualification, because (1) the loan is intended to be secured by the distribution to Glasman of 49% of the stock of a proposed corporation; (2) the value of the corporate stock depends on the granting of permission for transfer of the station license to the corporation; (3) this involves in effect the prejudging by the Commission of two applications not yet before it; (4) hence the security for the loan is conditioned on a judgment of the Commission which it is powerless to make. If this contention means that the policy of the Commission is to refuse an application—in all other respects satisfactory—merely because an applicant honestly contemplates the formation of a corporation—in the event his application is granted—to which he will transfer the permit and license, with the consent of the Commission, it would seem to verge closely upon arbitrary and capricious action. It would seem to be a rather idle and expensive gesture to require the formation of a corporation for such a purpose before the securing of a construction permit, when a refusal to grant the permit would automatically abort the whole occasion and purpose of the corporation. It would seem on its face to be a rather severe restriction upon business enterprise and an unnecessary limitation upon the availability of radio service in a particular community. Moreover, it would seem to be a particularly arbitrary and futile procedure in a case such as this, where the applicant fully and fairly revealed his plans. Ordinarily, there would be nothing to
9 prevent an applicant from securing a construction permit and a station license; thereafter forming a corporation; and then requesting permission to make the assignment. Should a penalty be placed upon one who has the foresight to plan his project in advance and reveal its full details? If the applicant is confident that he can make such a showing as to secure the Commission's approval of a subsequent transfer, should the Commission object? In fact, should not the Commission invite just such a revelation of plans so that it can have that contingency in mind when passing on the application for a construction permit; rather than drive the applicant to conceal his plans until after the construction permit has been granted? However, we are not required to decide this question because the first alternative contention of the Commission is not supported by the findings. So far as relevant to this point they read as follows:

". . . Mr. Heitmeyer agreed to pay 6% interest on the principal, and to repay the loan within five years. *However, in the event the loan is not paid under those terms*, Mr. Heitmeyer is obligated to assign to Mr. Glasman 49% of the stock of the proposed licensee corporations(s)." [Italics supplied]

It is obvious from the language used in the finding that the assignment of corporate stock by way of security was not contemplated

unless and until Heitmeyer had made default in his obligation to repay the loan within five years. Heitmeyer insisted throughout his testimony that such was the intention of Glasman and himself, and the Commission found accordingly.

It is apparent that the Commission recognized the invalidity of the above contention because it went on to state a second alternative as follows: The appellant intends to use such borrowed money without giving security therefor; hence he has failed to show sufficient financial responsibility "since the physical equipment of this station may become subject to lien, foreclosure, and seizure by the lender, as a matter of law, in the event the loan is not repaid within the five-year period." Assuming that the loan should not be repaid at the end of five years it may well be that foreclosure and seizure might result. Does this possibility support the contention that appellant has thus failed to show his financial qualification? The question, otherwise stated, is whether an application such as Heitmeyer's may be properly denied because the applicant proposes to use borrowed money for the purpose of construction and operation, unless the money borrowed is covered by sufficient collateral or other security to insure the station against lien, foreclosure, and seizure for a longer period than five years. Can such a standard be upheld?

In answering this question we look first for some measure of financial qualification to guide us. We are referred to no rule or regulation of the Commission suggesting such a rigid standard. On such an important question we think the public is entitled to have the statute implemented by a regulation setting out clearly and concisely just what the Commission regards as a minimum standard of financial ability. Evidently Congress had the same intent because the statute provides that all "applications shall set forth such facts as the Commission *by regulation may prescribe* as to . . . *financial, technical, and other qualifications*" of the applicant. [§ 308 (b).] [Italics supplied.]

In the absence of such a guide, the appellant suggests that we look to the practice of the Commission in previous cases as set forth in his brief, although not revealed in the record. We are asked to do this on the theory that the Commission "has not refused to grant construction permits for new stations to those who are qualified and experienced in the operation and management of radio stations simply because they did not have abundant personal finances without borrowing to construct and carry on the operation of the proposed stations." Whether or not the Commission has in the past granted licenses under similar circumstances is immaterial. It is fully authorized to increase, by regulation, the requirements previously imposed if the public interest requires. [§ 303 (f).] However, in the absence of a regulation, a common sense view of prevalent business methods would seem to justify the use of such borrowed funds for the purpose, un-

less some circumstance, special to the radio broadcasting industry, distinguishes it from others.

It is true, as suggested in argument, that Congress has imposed heavy obligations upon the Commission to discover and prevent any alien, criminal, or other improper control of radio broadcasting stations, and to guarantee so far as possible an independent, wholesome policy in management and operation. See Sections 303, 308 (b), 310 (a), 311, 313. To the same general end the Act gives to the Commission control of assignments and transfers of construction permits [§ 319 (b)]; station licenses [309 (b) (2)]; and of all rights thereunder, whether such assignments or transfers be voluntary or involuntary, direct or indirect [§ 310 (b)].

It is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of its finances. By establishing a high enough standard of financial qualification, the Commission can eliminate many of the hazards of such control, direct or indirect in character. It is in the public interest that it should not be impeded in a reasonable exercise of its discretion. The public interest in this respect far outweighs the private interest of any individual applicant. Reading Broadcasting Co. v. Federal Radio Commission, 48 F. (2d) 458, 60 App. D. C. 89. Perhaps under some circumstances the Commission might be justified in insisting upon the complete financial independence of an applicant.

In any event, the burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect, by any person within the classes proscribed by the statute. Beebe v. Federal Radio Commission, 61 F. (2d) 914, 61 App. D. C. 273. See Campbell v. Galeno Chemical Co. 281 U. S. 599, 609.

If, then, it appears from the application, or upon the hearing, that the applicant's financial condition is such that there is a probability that he may lose control of the station or that there may be either a voluntary or an involuntary transfer of his rights in relation
11 thereto, a situation may arise in which the Commission will be called upon to enforce the provisions of the sections to which reference has just been made. Sproul v. Federal Radio Commission, 54 F. (2d) 444, 60 App. D. C. 333. Under such circumstances it may be wiser from an administrative point of view to avoid such a contingency by insisting upon the removal of the probability before a permit is granted. If so, it is not our place to question the wisdom of the provisions, or to determine whether the Commission's administrative determination was the wisest under the circumstances. Radio Commission v. Nelson Bros. Co., 289 U. S. 266, 277.

In support of the position taken by the Commission in this case, it can be argued that neither in his original application nor in his financial statement did Heitmeyer reveal his relationship to Glasman. Moreover, it was disclosed at the hearing that Heitmeyer was an employee of Glasman and that he expected to maintain that relationship if and when he should operate the proposed station at Cheyenne. This all lends color to the suggestion made on cross-examination that Heitmeyer was the personal representative of Glasman, or that Glasman was an undisclosed partner and that, in his application and his financial statement, Heitmeyer deliberately avoided revealing Glasman's possible interest in the proposed station.

However, the Commission made no such findings, nor any findings which would support such conclusions. Moreover, the rejection of the application is not placed on any such ground. Again, even if these facts had been found they would not have shown lack of financial qualification per se, but merely possible danger of improper control, if the lender happened to be within one of the classes proscribed by Congress.

No matter how good that reason may be generally for excessive caution on the part of the Commission, it loses its force in this case because the lender of the money was himself the owner of a controlling interest in a licensee corporation, and had presumably satisfied all of the exacting requirements of the Commission. If he was acceptable as a licensee, how could it be argued that the applicant who borrowed from him would, as a result thereof, be directly or indirectly controlled by anyone—person, government, or corporation—within the proscription? If such reasoning weighed in the rejection of the application, then the Commission based its decision upon facts and circumstances which do not appear in its findings, and which should not have been considered. Interstate Commerce Commission v. Northern Pacific Ry., 216 U. S. 538, 544–45.

Therefore, in the absence of a showing that the applicant failed to comply with any regulation setting minimum standards of financial qualification; in view of the fact that the source of the applicant's money and his relationship to the lender were fully revealed at the hearing; and in view of the fact that the lender was himself a licensee of the Commission, the argument which we have assumed in support of the Commission's decision falls of its own weight. If the loan was bona fide, and there is no finding and no evidence to the contrary, it would seem to stand in the same position as any other legitimate plan of financing.

12 The question then is whether the regulation imposed—by implication at least—in this case was a reasonable one. The Commission argues that the money which the applicant had in bank was unsecured by collateral and hence the lender might satisfy the obligation by taking over the station. What then would be considered safe? Collateral securing a loan might fail, as much of it did

during the recent depression; money in bank, belonging entirely to an applicant might be lost by reason of a bank failure; cash in hand or in a safety deposit box might be stolen. We cannot require the impossible in attempting to guarantee safety. The people of the State of Wyoming, and of its capital, Cheyenne, are entitled to radio facilities if there be an applicant available and ready to supply them who can satisfy usual and ordinary standards of business safety. In this period of economic uncertainty financing reasonably assured five years in advance would seem to constitute much more than the average of business security. If the standard of financial responsibility required by the Commission in this case were imposed upon the country generally, business would cease. Under the circumstances, can it be said that the action of the Commission was anything but arbitrary, if not capricious? We think not; especially as its own findings were insufficient to support its conclusions of law and the decision based thereon. Florida v. United States, 282 U. S. 194, 212–15.

The discretion which the Commission is directed to exercise is not absolute. The purpose of the statute is to secure to the people of the several states and communities a fair, efficient, and equitable distribution of radio service. The Commission is directed by the statute to apply this standard in considering applications for licenses "when and insofar as there is demand for the same" [§ 307 (b)]; and, "if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license . . ." [§ 307 (a)].

Proper administration of the law by governmental agencies such as the Communications Commission requires careful observance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication. Interstate Commerce Commission v. Northern Pacific Ry., supra; American Sumatra Tobacco Co. v. Securities and Exchange Commission (No. 6776, decided September 30, 1937), — F. (2d) —, — App. D. C. —.

The decision, therefore, will be reversed and the case remanded to the Commission with instructions to proceed with the application in conformity with this opinion. This does not mean that it is directed to issue a permit to the appellant. It is not the function of this court "to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. . . . the Commission in its further action is to respect and follow the . . . determination of the questions of law" by this court. Radio Commission v. Nelson Bros. Co., 289 U. S. 266, 276, 278.

Reversed and remanded.

13 In the United States Court of Appeals for the District of Columbia

No. 6762. October Term, 1937

PAUL R. HEITMEYER, APPELLANT
vs.
FEDERAL COMMUNICATIONS COMMISSION

[File endorsement omitted.]

Judgment

Filed Dec. 27, 1937

Appeal from the Federal Communications Commission

This cause came on to be heard on the transcript of the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Federal Communications Commission in this cause be, and the same is hereby, reversed, and that this cause be and the same is hereby remanded to the said Federal Communications Commission with instructions to proceed in conformity with the opinion of this Court.

Per Mr. Justice MILLER.

DECEMBER 27, 1937.

Mr. Justice Stephens did not sit in this case.

Mr. Chief Justice Wheat of the District Court of the United States for the District of Columbia sat herein by designation of the Court.

14 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, CHEYENNE, WYOMING, APPELLANT
vs.
FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Petition for stay

Filed Jan. 15, 1938

The appellant respectfully shows:

1. Under Section 402 of the Communications Act of 1934, as amended, a notice of appeal and reasons therefor was filed June 29, 1936, Under date of March 9, 1937, appellant, by counsel, peti-

tioned this honorable Court to issue an order staying further proceedings by the Federal Communications Commission on any application which would or might prejudice the rights of this appellant. To the best of appellant's knowledge this petition was never acted on by the Court. However, under date of December 27, 1937, the Court published its opinion in this case; reversed the Commission and remanded the case to the Commission with instructions to proceed with the application in conformity with the Court's opinion.

2. While appellant's case was pending in this Court and on January 25, 1937, the Frontier Broadcast Company filed an application for a new station at Cheyenne, Wyoming, Commission Docket No. 4318. This application has been heard, examiner's report made, argued on exceptions to the examiner's report before the broadcast division of the Commission, and is set for reargument before the full Commission on January 28, 1938. After this argument, the case will be ready for final decision by the Commission. A second applicant, Cheyenne Radio Corporation, filed an application on October 31, 1936, requesting the same identical facilities as requested by this appellant. The granting of either of the foregoing applications would seriously prejudice whatever rights this appellant has under Section 307B of the Communications Commission Act of 1934, as amended, or before amendment. Furthermore, the granting of the application of the Cheyenne Radio Corporation would preclude the granting of appellant's application and thereby defeat the very purpose of this appeal.

3. Under date of January 12, 1938, the Federal Communications Commission filed a motion with this honorable Court asking the Court to stay its mandate to the Federal Communications Commission pending the filing by said Commission of a petition for certiorari to the Supreme Court of the United States. Appellant assumes that this motion will be granted and that whether or not the petition for certiorari is granted there will be further delay in the final decision of appellant's case.

4. Under the present rules and regulations, and practice before the Federal Communications Commission, all pending applications which conflict with appellant's application may be heard and decided by the Commission, possibly before appellant's case is finally decided. The population of the City of Cheyenne was 17,361 (1930 Census). At present, the population is estimated to be 22,550. Consequently, it is very doubtful if the City is large enough to support two stations. In fact, Examiner Seward, in his report of the hearing on the application of Frontier Broadcasting Company used the following language:

"In view of the fact that the City of Cheyenne could not, when considering the evidence adduced at the Heitmeyer hearing as well as the instant hearing, support two broadcast stations, and the fact that the Heitmeyer application is now on appeal, it is considered that

this Commission is not in a position to grant any application
16 for the construction of a radio broadcast station in the City of Cheyenne, Wyoming, until the Heitmeyer case has been finally determined by the Court."

The granting of any of these conflicting applications whether the conflict is technical or otherwise, would seriously prejudice, if not actually defeat the rights of this appellant.

Wherefore, because of the foregoing, petitioner prays an order staying the Federal Communications Commission, pending final decision of appellant's cause, from granting construction permit or license for a radio station at Cheyenne, Wyoming, or any construction permit or license which would prevent or seriously interfere with the granting of petitioner's application.

Respectfully submitted.

PAUL R. HEITMEYER,
By CLARENCE C. DILL,
Clarence C. Dill
JAMES W. GUM,
His Attorneys.

[*Duly sworn to by James W. Gum; jurat omitted in printing.*]

Service of copies of the foregoing petition and attached order acknowledged this 15th day of January, 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By HAMPSON GARY, *General Counsel.*
By F. NEYMAN.

17 [File endorsement omitted.]

18 In United States Court of Appeals

. . . . . .

No. 6762

PAUL R. HEITMEYER (APPELLANT), PETITIONER

vs.

FEDERAL COMMUNICATIONS COMMISSION

January 20, 1938

Order granting petition for stay

Petitioner having applied to this Court for an order to the Federal Communications Commission directing it to stay further consideration of any application for a broadcast license at Cheyenne, Wyoming, and it appearing to the Court that petitioner's application for a license at Cheyenne has been by decision of this Court ordered to be reconsidered by the Commission and that application has or will

be made to the Supreme Court for a review of this Court's decision, and it further appearing that the granting of an application for a station at Cheyenne on any pending application other than petitioner's will prevent a reconsideration of petitioner's application if the decision of this Court is affirmed by the Supreme Court or if a writ of review is denied: It is ordered by the Court that the Commission stay all further proceedings in relation to a station license at Cheyenne, Wyoming, until final action and decision is had on petitioner's application. It is further ordered that the Clerk of this Court transmit a copy of this order to the Federal Communications Commission.

D. LAWRENCE GRONER, *C. J.*

JANUARY 20, 1938.

19 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Motion to vacate stay order

Filed March 3, 1938

Now comes the Federal Communications Commission by its counsel and moves the court for an Order vacating its Order of January 20, 1938, in the above-entitled cause "that the commission stay all further proceedings in relation to a station license at Cheyenne, Wyoming, until final action and decision is had on petitioner's application" and respectfully shows the court:

1. That the petition for stay filed by appellant herein recited as follows:

"2. While appellant's case was pending in this Court, and on January 25, 1937, the Frontier Broadcast Company filed an application for a new station at Cheyenne, Wyoming, Commission Docket No. 4318. This application has been heard, examiner's report made, argued on exceptions to the examiner's report before the broadcast division of the Commission, and is set for reargument before the full Commission on January 28, 1938. After this argument, the case will be ready for final decision by the Commission. A second applicant, Cheyenne Radio Corporation, filed an application on October 31, 1936, requesting the same identical facilities as requested by this appellant. The granting of either of the foregoing applications would seriously prejudice whatever rights this appellant has under Section

307 B of the Communications Commission Act of 1934, as amended, or before amendment. Furthermore, the granting of the application of the Cheyenne Radio Corporation would preclude the granting of appellant's application and thereby defeat the very purpose of this appeal.

"3. Under date of January 12, 1938, the Federal Communications Commission filed a motion with this honorable Court asking the Court to stay its mandate to the Federal Communications Commission pending the filing by said Commission of a petition for certiorari to the Supreme Court of the United States. Appellant assumes that this motion will be granted and that whether or not the petition for certiorari is granted there will be further delay in the final decision of appellant's case.

"4. Under the present rules and regulations, and practice before the Federal Communications Commission, all pending applications which conflict with appellant's application may be heard and decided by the Commission, possibly before appellant's case is finally decided. The population of the City of Cheyenne was 17,361 (1930 Census). At present, the population is estimated to be 22,500. Consequently, it is very doubtful if the City is large enough to support two stations. In fact, Examiner Seward, in his report of the hearing on the application of Frontier Broadcasting Company used the following language:

"'In view of the fact that the City of Cheyenne could not, when considering the evidence adduced at the Heitmeyer hearing as well as the instant hearing, support two broadcast stations, and the fact that the Heitmeyer application is now on appeal, it is considered that this Commission is not in a position to grant any application for the construction of a radio broadcast station in the City of Cheyenne, Wyoming, until the Heitmeyer case has been finally determined by the Court.'

20 "The granting of any of these conflicting applications whether the conflict is technical or otherwise, would seriously prejudice, if not actually defeat the rights of this appellant."

2. That the petitioner's prayer was for an order "staying the Federal Communications Commission, pending final decision of appellant's cause, from granting construction permit or license for a radio station at Cheyenne, Wyoming, or any construction permit or license which would prevent or seriously interfere with the granting of petitioner's application."

3. That on February 17, 1938, the Commission notified the Clerk of this Court that no petition for certiorari would be filed, whereupon on February 21, 1938, the Mandate in this cause was issued by the Court.

4. That the opinion and judgment of this Court instructed the Commission that in its further action it should "respect and follow

the determination of the questions of law by the Court" but did not direct the Commission to issue a permit to the appellant.

5. That the Commission, in the exercise of its discretion and judgment, under the Communications Act of 1934, can grant a construction permit only "if public convenience, interest, or necessity will be served by the construction of the station," and in deciding the merits of appellant's application, should not be precluded from considering all pending applications on a comparative basis as affecting the public convenience, interest, or necessity and should be enabled to reopen the record in this case for the purpose of obtaining additional evidence if necessary, and considering all material facts which may be necessary to a final determination of the issues involved, even though occurring subsequent to the making of the original record herein.

6. That although the Commission recognizes the equity of appellant's contention that no other application should be decided prior to its application, nevertheless, the Commission's primary duty is to consider the public interest rather than the private interest of any individual applicant and the Commission, in the event of conflicting applications, should be enabled to consider all pending applications on a comparative basis and grant that application which in its judgment would best serve public convenience, interest or necessity.

21 Wherefore, the Federal Communications Commission moves the Court for an Order vacating its Stay Order of January 20, 1938, in this cause.

Respectfully submitted.

FEDERAL COMMUNICATIONS COMMISSION,
By HAMPSON GARY,
Hampson Gary,
General Counsel.
GEO. B. PORTER,
George B. Porter,
Assistant General Counsel.
FANNEY NEYMAN,
Fanney Neyman,
Assistant Counsel.
JOHN A. HARTMAN, JR.,
John A. Hartman, Jr.,
Assistant Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the within and foregoing Motion to Vacate Stay Order acknowledged and a copy thereof received this 3rd day of March 1938.

CLARENCE C. DILL,
Counsel for Appellant.

22 [File endorsement omitted.]

23 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

Motion to deny petition to vacate stay order and answer

Filed March 7, 1938

Comes now Paul R. Heitmeyer, the appellant, by his counsel, and moves the Court to deny and dismiss the motion of the Federal Communications Commission for an Order vacating the Court's Stay Order of January 20th, 1938, in this cause, and in answer to the statements made by the Commission in support of its motion to vacate the order, respectfully shows:

1. As to Paragraph 1:

All of the statements in appellant's petition upon which the Court based its Stay Order are still true except that the Commission has withdrawn its motion for stay of judgment for purpose of securing a writ of certiorari from the Supreme Court. There will still be considerable delay in deciding appellant's case, so that no modification of the Stay Order should permit consideration and action on other applications by the Commission until it has finally acted on appellant's application.

2. As to Paragraph 2:

While the Court's Stay Order was in somewhat different form from the order prayed for by appellant, appellant bows to the wisdom of the Court and declares himself entirely satisfied with the form of the Stay Order as issued by this Court.

3. As to Paragraph 3:

The fact that the Court issued its judgment in this case under
24 date of February 21, 1938, is the strongest possible reason why the Commission should act on appellant's application promptly and in accordance with the Court's instructions "to proceed with the application in conformity with this opinion."

4. As to Paragraph 4:

The Commission's citation of the fact that this Court did not overstep its powers by ordering the Commission to grant a construction permit is no reason for further delay by the Commission in the performance of its duty under the law and under the decision of this Court, namely, to decide this case by either granting a construction permit or refusing a construction permit.

5. As to Paragraphs 5 and 6:

In these two paragraphs the Commission makes clear that while its motion is to dissolve the Stay Order it is in reality asking that

the Court modify its judgment. It does not desire permission simply to proceed with further consideration of the subsequent applications for a new station at Cheyenne, Wyoming. What it really desires is permission to develop a new record in the Heitmeyer case and then consider that record on a comparative basis with the records of these subsequent applicants. There is no escape from that conclusion after reading the plea of the Commission as set forth in these paragraphs.

Under the cloak of an interpretation of the "public convenience, interest and necessity" provision of the statute, it asks this Court to vacate its Stay Order, granted to protect the rights of the appellant, so that the Commission may relegate appellant's application to the Docket, take new evidence and then compare the new record that may be made after such hearings, with the records already made or yet to be made in support of other applications for a radio station at Cheyenne, Wyoming. These were not filed until months after the record in this case had been closed, the Commission had
25 decided the case, and the appellant had taken his appeal to this Court.

In order that the Court may understand the full import of these proposals by the Commission, appellant calls attention to the following facts of record in the files of the Commission:

Application of Paul R. Heitmeyer for new station at Cheyenne, Wyoming: Hearing, October 30, 1935. Decision, June 12, 1936. Appeal, June 26, 1936. Reversal of decision, December 27, 1937.

Application of Frontier Broadcasting Company for new station at Cheyenne, Wyoming: Application filed, January 25, 1937. Hearing, February 26, 1937. Examiner's Report, April 6, 1936.

Application of Cheyenne Radio Corporation for new station at Cheyenne, Wyoming: Application filed, October 31, 1936. Held in pending files to be set for hearing.

January 5, 1938.—Frontier Broadcasting Company filed motion to set Heitmeyer application for reargument, consolidate argument on Heitmeyer and Frontier applications and consider them on comparative basis.

January 9, 1938.—Cheyenne Radio Corporation filed motion to set Heitmeyer and Frontier applications for rehearing, consolidate hearings of all three applicants and consider them on comparative basis.

January 11, 1938.—Paul R. Heitmeyer filed motion to deny motion of Frontier Broadcasting Company.

January 12, 1938.—Paul R. Heitmeyer filed motion to deny motion of Cheyenne Radio Corporation.

January 26, 1938.—Commission denied and dismissed all of above motions.

March 3, 1938.—Federal Communications Commission vacated its order denying the application of Paul R. Heitmeyer and the statement of facts and grounds of decision and "directed that the proceedings upon the application of Paul R. Heitmeyer be reopened in accordance with the opinion and judgment of the said court."

Statements made by the Frontier Broadcasting Company and by the Cheyenne Radio Corporation in support of their motions
26 to have the Commission set the Heitmeyer application for rehearing and re-argument and to consolidate hearings and arguments on all of said applications were based on the same theory that the Commission now advances in support of its motion, namely, that the "public convenience, interest, and necessity" clause of the statute should be so interpreted.

The Commission having denied these motions, it now uses the same reasoning in support of its motion to dissolve this Stay Order. Thus consciously or unconsciously the Commission has become the advocate of the interests of the two subsequent applicants for a new station at Cheyenne, Wyoming, as against the application of Paul R. Heitmeyer.

If it be said in reply that the Commission's denial of the motions of these two applications was in obedience to the Stay Order of this Court to take no further action regarding other applications for a station at Cheyenne, appellant still insists that the Commission is using the same argument in support of its motion to dissolve the Stay Order that these subsequent applicants used in support of their motions before the Commission for consolidation of the hearings, arguments and decisions on these applications. Such action would not be in accord with the opinion of the Court in this case.

That opinion was based on the record already made in this case. It made no reference to a new record nor to further hearings. It entitles this appellant to a decision upon the record in that case as it stood at the time of the appeal without regard to new parties who never appeared for consideration of their applications until long afterward. To consolidate all of these cases now and consider them on a comparative basis would be the negation of justice. It would be another arbitrary act on the part of the Commission.
27 It would be in direct violation of the established rule and practice of all courts of the land whereby the decision of the appellate court becomes a part of the mandate to the court below. See Gulf Refining Co. v. U. S., 269 U. S. 125; Metropolitan Water Co. v. Kaw Valley Drainage Dist., 223 U. S. 519, 523. This rule applies here to a quasi judicial or administrative body such as the Communications Commission. It must carry out the judgment of the Court of Appeals without regard to the interests or pleas of subsequent applicants. The fact that the Commission champions the cause of these applicants as a part of its plea to secure what is in reality a complete modification of the judgment of the Court makes no difference. This Court should not consider dissolving its Stay Order when the Commission's announced purpose is to make a new record and consolidate this case with the cases of applicants whose rights are entirely subsequent to and therefore separate from the rights of Heitmeyer, the appellant herein.

The Commission tries to justify its plea for permission of the Court to consider "all pending applications on a comparative basis as affecting the public convenience, interest or necessity" on the ground that they are a part of the conditions it must now consider under the law.

The applicant, Paul R. Heitmeyer, is not required to oppose these new applications to secure a decision on his own application, filed, heard, decided and appealed before either of these subsequent applicants were ever heard of by the Commission. It would be a travesty on the right of appeal to require him to do so. These applications came into existence while he was securing a rectification of the error of the Commission. The Commission having made one error, now tries to use some of the developments that have occurred while the Court was rectifying that error, to further delay and handicap the appellant in securing a correct decision. These might
28 be proposals to consider if the Commission were asking the Court to order a rehearing in this case. They can not now be considered by this Court as a basis for dissolving a Stay Order and to secure what is in reality a complete modification of the Court's opinion and order.

That order remanded the case to the Commission "with instructions to proceed with the application in conformity with this opinion."

That doesn't mean a new hearing. It can not mean a comparison with the merits of other subsequent applications. It means finding the applicant Heitmeyer financially qualified, making a finding as to whether or not there is need for the station and then granting the construction permit if there is a need or refusing it if there is no need.

As a closing plea for the permission to modify the judgment and order in this case, the Commission declares that its "primary duty is to consider the public interest rather than the private interest of any individual applicant." This is begging the question. That is always the Commission's duty. That was its duty in June 1936, when it first decided this case, and by its arbitrary action made an error. The Court having pointed out that error has ordered the Commission to rectify it. Carrying out the Court's order is now the primary duty of the Commission.

What about the public interest of the people of Cheyenne, Wyoming, who have been without any radio service now for all these years? The arbitrary action of the Commission has prevented the establishment of a new station during all the period of this appeal. What about the need of the state capital of Wyoming during the further long period of new hearings, and court appeals that will certainly follow new arbitrary acts by the Commission?

Instead of pleading the arguments of two subsequent appli-
29 cants who were unheard of and unknown to this case when it was heard, decided and appealed, the Commission should first do its duty by the applicant it has wronged, the appellant herein. It

was arbitrary with him then. By this motion it seeks permission of the court to carry out its arbitrary will by developing a new case, with a new record and then deciding his application on a comparative basis with these subsequent applicants.

If new and other applicants are to be considered, they must be considered afterward. The Commission may decide to overrule its Examiner who made a finding in the Frontier Broadcasting Company case that Cheyenne can support only one station. These applicants can always apply for the facilities of the new station, if the Commission grants a construction permit to Heitmeyer. This will bring about a consolidated hearing and argument and a consideration of all these applicants on a comparative basis. That is the legal method, the just method, the fair method of securing such a hearing, argument and decision.

Granting this plea of the Commission to permit it to consolidate consideration of appellant's application with these subsequent applications will set a most dangerous precedent. If the Commission should then make an error in its second decision, the Court could again be called upon by the Commission or by some other new and subsequent applicants, to have a new consolidation of the new applications filed for these same facilities while the second appeal was pending. This process of appeals and consolidation of consideration of applications could thus be carried on indefinitely, because if the argument submitted by the Commission in its motion herein is valid, namely, that the public interest, convenience and necessity demand a consideration of all subsequent applications for similar facilities, before acting on appellant's application, the same argument would be valid after every new appeal.

30 This is the first time of which counsel is aware that the Court of Appeals has remanded a decision to an administrative or quasi-judicial body of the Federal Government for revision where during the period covered by the appeal another applicant for a grant of the same or similar privilege has already come before that body and after the Court's decision has been announced that body has asked for permission to consolidate consideration of the appellant's application with the subsequent application.

Search of the records and inquiry of the Federal Power Commission and the Interstate Commerce Commission fails to reveal any such case. The Court therefore will be pioneering in a new field of administrative law in the decision it makes in answer to the plea of the Commission in this case.

Appellant respectfully submits:

1. That since the Commission on March 3, 1938, took the first step in carrying out the judgment of this court by vacating its decision in this case, the statement of facts and grounds of decision, this case is now ready for final decision by the Commission on the record in accordance with the opinion of this Court;

2. That the Commission should now proceed forthwith to prepare a new statement of facts in conformity with the court's opinion, making a finding that the applicant is financially qualified, and then make its finding on the record in this case as to whether or not there is a need for the proposed station. Upon this last finding will depend whether or not the granting of the construction permit will serve public convenience, interest, and necessity.

3. That if the Commission finds there is a need, it must
31 issue the construction permit; if it finds there is no need, it should not grant the construction permit.

Respectfully submitted.

PAUL R. HEITMEYER,
By CLARENCE C. DILL,
Clarence C. Dill,
JAMES W. GUM,
His Attorneys.

[*Duly sworn to by Clarence C. Dill; jurat omitted in printing.*]

ACKNOWLEDGEMENT OF SERVICE

Service of the within and foregoing Motion to deny petition to vacate Stay Order and Answer acknowledged and a copy thereof received this 7th day of March, 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By HAMPSOM GARY, *General Counsel.*
Hampson Gary.

32 [File endorsement omitted.]

33 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Opposition of the Federal Communications Commission to Appellant's motion to deny petition to vacate stay order

Filed March 10, 1938

Now comes the Federal Communications Commission by its counsel and opposes appellant's "Motion to Deny Petition To Vacate Stay Order and Answer" for the following reasons:

A. The Stay Order Herein Goes Beyond the Jurisdiction of This Court and Interferes With the Reasonable Regulatory Power of the

Federal Communications Commission Under the Communications Act of 1934.

The Mandate of this Court in the above-entitled case, which issued on February 1, 1938, reversed the decision of the Commission and remanded the case to it with instructions to proceed with the application in conformity with the opinion. The Court said:

"This does not mean that it is directed to issue a permit to the appellant. It is not the function of this Court 'to revise the action of the Commission from an administrative standpoint and to make an administrative judgment . . . the Commission in its further action is to respect and follow the . . . determination of the questions of law' by this Court."

Section 319 (a) of the Communications Act of 1934 provides:

"No license shall be issued under the authority of this Act for the operation of any station, the construction of which is begun or is continued after this Act takes effect unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station * * *."

The Court determined "That the Commission has narrowed the case down to one question, that is, was the applicant financially qualified? Our inquiries, therefore, are similarly narrowed to a
34 consideration of the three italicized paragraphs of the 'Statement'. Upon them the Commission's decision must stand or fall."

The Stay Order granted by this Court on January 20, 1938, provides that "the Commission stay *all further proceedings* in relation to a station license at Cheyenne, Wyoming, until final action and decision is had on petitioner's application." [Emphasis supplied.]

The decision of an Appellate Court is not to be construed as adjudicative of matters which the Court was not called upon to decide. Mutual Life Insurance Company v. Hill, 193 U. S. 551, 553 (1904).

The Commission on the record before it found that appellant was not financially qualified. With that finding this Court disagreed. There are, however, other elements in any determination of public interest, convenience and necessity which must be considered by the Commission, upon any determination of whether or not the application should be granted. The Commission, having found that the applicant was not financially qualified, did not decide those other elements. If upon a consideration of those elements now it should appear that the record before the Commission is in any such respect inadequate or incomplete, and that it is unable to base an ultimate finding of public interest, convenience and necessity thereon, it should be enabled to reopen the record for the purpose of obtaining such addi-

tional evidence as may be necessary to a final determination of the issues involved.

The appellant contends that the opinion of the Court was based on the record already made in the case, that it made no reference to a new record, nor to further hearings, and that it entitles the appellant to a decision upon the record in that case as it stood at the time of the appeal. It is submitted that this contention is not sound law. If a case is remanded to a court by a decision entitling one of the parties to an absolute and final judgment, then the lower court is without power to enter into a new trial, but this theory does not follow where a judgment is merely reversed and remanded without more, or where the case is left open for further proceedings generally, as is true in the instant case. Certainly this argument cannot be well made
35 where the primary concern of the Commission is that of the public interest, rather than the private interest of any individual applicant. To hold otherwise might require this Commission to make a final determination upon a record which, in the light of changing conditions, is entirely inadequate. It would be a "travesty" on the duty of this Commission to require it to do so.

B. The Commission's Duty Under the Communications Act of 1934 Is to Consider All Applications in the Public Interest, Convenience and Necessity, and Mere Priority of an Application Cannot Give such an Applicant Any Fixed Right as Against the Reasonable Regulatory Power of the United States.

Appellant has pointed out both in its Petition for Stay and its Motion to Deny the Petition to Vacate the Stay Order that there are at present pending before this Commission two additional applications for broadcasting facilities at Cheyenne, Wyoming, one of which requests the identical facilities applied for by this applicant. Each of these other applicants filed motions requesting this Commission to set appellant's application for reargument, consolidated with argument upon its own applications and for consideration contemporaneously therewith.

On January 26, 1938, in view of the Stay Order issued by this Court, the Commission denied these motions, and on March 3, 1938, in accordance with the opinion and judgment of this Court, vacated its Order denying the application of Paul R. Heitmeyer and directed that said application be reconsidered in accordance with the opinion and Mandate of this Court.

The appellant contends that as a result of filing its Motion to Vacate the Stay Order in this case, "the Commission has become the advocate of the interests of the two subsequent applicants for a new station at Cheyenne, Wyoming, as against the application of Paul R. Heitmeyer." This Commission, although a respondent in the appeal in this case, is not a party interested in or concerned with any one of these three applications, except insofar as it desires to fulfill the duty imposed upon it by the Congress to grant applications when

public interest, convenience and necessity will be served regardless of whose application it be. Moreover, concurrent consideration of the applications of the Frontier Broadcasting Company or the Cheyenne Radio Corporation with the application of appellant cannot assume a denial of the appellant's application. The Commission under
36 the Act is required to consider these applications on a comparative basis to determine which, if any, will best serve public interest, convenience, and necessity, and the mere fact that appellant's application was filed prior in time to other applications for the same facilities, does not give this applicant any fixed right as against the reasonable regulatory power of this Commission under the Communications Act of 1934 to grant the application which in its sound discretion and judgment will best serve public interest, convenience, and necessity. Great Lakes Broadcasting Company v. Federal Radio Commission, 59 App. D. C. 197, 199; Pulitzer Publishing Company v. Federal Communications Commission, — App. O. C. — (No. 6866, decided December 6, 1937, not yet reported).

It is suggested by the appellant that if the Commission grants a construction permit to it the other applicants can always apply for the facilities of the new station which would result in a consolidated hearing and argument and a consideration of all the applications on the comparative basis. The contingency which appellant suggests has already arisen. An application for the identical facilities applied for by appellant is actually now on file. It is difficult to see, therefore, how the action of the Commission in considering these conflicting applications now would be more prejudicial to the appellant than to require them to be considered in the future.

It is respectfully submitted that the Stay Order now in effect in the cause herein will preclude the Commission from carrying out its duties as aforesaid under Section 319 (a) of the Communications Act of 1934 and that the Commission's Motion to Vacate does not in anywise request a reconsideration by the Court of its opinion and judgment as to the merits of this case but is directed solely to the Stay Order which appears to interfere with the carrying out by the Commission of its duties and responsibilities under the Communications Act of 1934 as aforesaid.

The Stay Order issued by this Court not only prevents action by this Commission on other applications for a station license at Cheyenne, Wyoming, prior to final action and decision on the appellant's application, but precludes consideration by this Commission of such applications contemporaneously with appellant's application and such other applicants are not before this Court.

37 Wherefore, the Federal Communications Commission prays that the Court dismiss the Motion of the Appellant to Deny Petition to Vacate Stay Order, and grant the Motion of this Commission to Vacate the Stay Order. This matter being of great importance to this Commission in the exercise of its statutory duty, it is further prayed that, if the Court upon consideration of the

motions and answers herein is not of the opinion that the Stay Order should be vacated, this matter be set down for oral argument before the Court at which time the parties herein may more fully present their contentions.

Respectfully submitted.

FEDERAL COMMUNICATIONS COMMISSION,

By HAMPSON GARY,
Hampson Gary,
General Counsel.

GEO. B. PORTER,
George B. Porter,
Assistant General Counsel.
FANNEY NEYMAN,
Fanney Neyman,
Assistant Counsel.
JOHN A. HARTMAN, JR.,
John A. Hartman, Jr.,
Assistant Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the within and foregoing Opposition of the Federal Communications Commission to Appellant's Motion to Deny Petition to Vacate Stay Order acknowledged and a copy thereof received this 10 day of March A. D. 1938.

JAMES W. GUM,
Counsel for Appellant.

38 [File endorsement omitted.]

39 In United States Court of Appeals

* * * * * * *

No. 6762

PAUL R. HEITMEYER, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

Order granting motion to vacate stay order

March 17, 1938

On consideration of the motion to vacate the stay order of January 20, 1938, herein, It is ordered by the Court that the motion be, and it is hereby, granted.

* * * * * * *

40 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

Motion for rule to show cause

Filed April 27, 1938

Comes now Paul R. Heitmeyer, the above named appellant by his attorneys, Clarence C. Dill and James W. Gum, and respectfully moves the Court for a rule upon the Federal Communications Commission, to show cause why it has not complied with the judgment of this Court heretofore made and entered December 27, 1937, in the above entitled action by making correct findings of basic facts, with grounds for decision, and a final order of the record in this case in accordance with the Court's opinion herein.

As reasons and grounds for the issuance of said rule, Petitioner shows to the Court the following facts:

When the Court reversed the decision of the Federal Communications Commission, December 27, 1937, it stated that this cause would be remanded to the Commission "with instructions to proceed with the application in conformity with this opinion." The Commission failed to apply for a Writ of Certiorari to the Supreme Court, whereupon this Court, on February 19, 1938, issued its final judgment, reversing the Commission and remanding the case to the Commission "with instructions to proceed in conformity with the opinion of this Court."

Under date of April 20, 1938, in Press Release No. 26714 and Report No. 117, page 4, the Commission published its Order relative to further proceedings in this case. The Order as released is as follows:

41 "The Commission having on March 2, 1938, vacated its Order of May 1, 1936, denying the application of Paul R. Heitmeyer for CP to use 1210 kc., 100 watts, 250 W-LS, Unltd. time, and the related statement of facts and grounds for decision, pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia, in No. 6762, Paul R. Heitmeyer, v. Federal Communications Commission, the Commission, upon its own motion, directed that the record in this case be reopened for further hearing and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company, and a hearing this day ordered upon the application of

the Cheyenne Radio Corp., such further hearing to be held before an Examiner."

This Order is not in conformity with the Court's opinion. Instead, it circumvents and negatives the judgment of this Court. When the Commission failed to apply for a Writ of Certiorari, the decision of this Court became a final judgment. (Sec. 402 (e).) The Commission then had but one duty, namely, to carry out the order of the Court. Instead, it has attempted to create a new case with new parties.

By what right or authority "in conformity with the opinion of this Court" does the Commission attempt to compel this appellant to contest with new parties in order to secure basic findings of fact, correct grounds for decision, and a final order on the record in his own case?

The Frontier Broadcasting Company and the Cheyenne Radio Corporation never were parties to this cause. The Commission never secured the permission of this Court to make them parties. They have no right to oppose appellant's application under the Communications Act of 1934. They can not be given such rights under the Rules of the Commission. They have no part in this cause under the practice and procedure of this Court.

If such procedure be permitted, the only effect of the Court's reversal of the Commission's decision in this case would be to cause the Commission to hold further hearings on a comparative basis with two new applicants for a radio broadcasting station at Cheyenne, Wyoming. To allow the Commission to proceed in that manner would defeat the right and purpose of appeal as provided by the law. In fact, it would compel appellant to try and win his case a second time against new parties and under new conditions, all because the Commission's decision and findings were arbitrary and not supported by substantial evidence and not through any fault of the appellant.

42

Sec. 307 (a) of the Communications Act of 1934 specifically provides that the Commission shall grant applications when made by qualified applicants and when public interest, convenience, and necessity will be served.

The Commission found the appellant technically and legally qualified. The Court declared him financially qualified. The Court in its opinion also declared "the people of the State of Wyoming and of its capital, Cheyenne, are entitled to radio facilities if there be an applicant available and ready to supply them who can satisfy usual and ordinary standards of business safety." Yet the Commission now refuses to make any corrected findings and final order "in conformity with this Court's opinion."

This applicant has diligently prosecuted his case for more than three years. He respectfully submits that the Commission, having acted arbitrarily and made a decision not supported by substantial evidence, should not now be permitted to delay further the making

of basic findings of fact with correct grounds of decision in conformity with the Court's opinion, and entering a final order on the record.

When the Commission set this case for hearing originally it thereby placed upon the applicant the burden of proving his case. The applicant accepted this burden of proof. He offered evidence in support of all of the issues set out by the Commission in its Notice of Hearing. At the end of said hearing the Examiner closed the record and later recommended that the Commission grant his application.

43 The Commission proceeded to make its findings on the record, and wrote its decision based on that record. The Court of Appeals reversed that decision on that record and remanded the case to the Commission for a new decision. That new decision must be made on the record which the Commission itself declared closed and upon which this Court rendered its judgment.

The Commission has repeatedly ruled that an applicant must stand or fall on the proof made in the record at the hearing and that he is bound by that record, once it has been closed. If the appellant is bound by that record, so is the Commission. Just so in this case. Both the appellant and the Commission are bound by it. The application must be granted or denied on the basis of the evidence he placed in that record.

If it be argued that the "public interest" requirement of the law makes it necessary for the Commission to hold further hearings on a compartive basis with the new and other applicants for radio stations, at Cheyenne, who did not file their applications until months after the appeal in this case was taken, appellant respectfully calls attention to the dangerous precedent such procedure would establish. Such a hearing would be followed by a new decision, from which a new appeal might be taken. A new reversal of that decision would in turn require another further hearing with any other new applicants who might have filed applications for new radio stations at Cheyenne during the pendency of the second appeal. Under such procedure it might easily be several years before the people of Cheyenne would secure the much needed radio service of a broadcasting station.

The same objection would arise even if the Commission simply desired to open the record of this case for further hearings without regard to new parties. Another mistaken decision, with an appeal and reversal, would, on the same theory, require opening the record again to still further hearings, resulting in still more delay.

44 Even worse than these objections is the fact that if this Court should permit the Commission to require the appellant to proceed with the proposed hearing, such procedure would violate the long established rule that an appellant is entitled to a corrected decision on the basis of the conditions as they existed at the time he made his record. This is the practice in the lower Courts after

reversal of a decision by an Appellate Court. It should apply in this case.

Wherefore, your Petitioner prays for a rule upon the Federal Communications Commission to show cause why it has not complied with the judgment of this Court heretofore made and entered by making a full and complete findings with grounds of decision and a final order based thereon and for such other and further relief as to the Court may seem proper.

Respectfully submitted.

PAUL R. HEITMEYER,
By ——— ———,
CLARENCE C. DILL,
JAMES W. GUM,
His Attorneys.

[*Duly sworn to by Clarence C. Dill; jurat omitted in printing.*]

Service acknowledged April 27, 1938.

HAMPSON GARY,
General Counsel, Fed. Comm. Comm.

45 [File endorsement omitted.]

46 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Opposition of Federal Communications Commission to the Pleading of Paul R. Heitmeyer for a "Rule to Show Cause"

Filed April 30, 1938

Now comes the Federal Communications Commission by its counsel and opposes the pleading of Paul R. Heitmeyer entitled "Motion for Rule to Show Cause" why "it [the Commission] has not complied with the Judgment of this Court heretofore made and entered December 27, 1937, in the above-entitled action by making correct findings of basic facts, with grounds for decision, and a final order on the record in this case in accordance with the Court's opinion herein," and, as grounds for such Opposition, respectfully shows the Court:

1. The certified copy of Opinion and Judgment of this Court in the above-entitled cause which issued to this Commission on February 1, 1938, reversed the decision of the Commission denying the application of Paul R. Heitmeyer for a construction permit to erect

a new radio broadcast station in Cheyenne, Wyoming, and remanded the case to the Commission with instructions to proceed with the application in conformity with the opinion, and that in its further action the Commission is to respect and follow the determinations of the questions of law by this Court;

2. Section 319 (a) of the Communications Act of 1934 provides:

"No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station." * * *"

47 3. The Commission on the record before it found that Paul R. Heitmeyer was not financially qualified. With this finding the Court disagreed. There are, however, other elements in any determination of public convenience, interest, and necessity which must be considered by the Commission upon any determination of whether or not the application should be granted. The Commission having found that the applicant was not financially qualified, did not decide those other elements.

Upon a consideration of the record at this time with respect to such other elements, it appears to the Commission that the rec is inadequate and incomplete, and that it is unable to base an ultimate finding of public interest, convenience, and necessity thereon. Moreover, as has already been shown to this Court by the Commission in its Motion to Vacate Stay Order in this case, there are pending before this Commission two additional applications for broadcast facilities at Cheyenne, Wyoming, one of which requests the identical assignment applied for by Paul R. Heitmeyer. In order properly to exercise its discretion and judgment under the Communications Act of 1934 the Commission must have full information, and in deciding the merits of the application of Paul R. Heitmeyer, and other pending applications for permit to erect a station at Cheyenne, Wyoming, or applications which conflict with that of Paul R. Heitmeyer, it is desirable that further evidence should be obtained, and the applications heard together.

Accordingly, on April 20, 1938, the Commission took the following action as is evidenced by its Minute No. 172–38:

"The Commission

"In the following case: Docket No. 3161. File No. B5–P–490. Applicant, Paul R. Heitmeyer, Cheyenne, Wyoming. Call Letters NEW. Nature of Application, Construction permit for new broadcast station to operate on 1210 kc; 100 watts, 250 watts–LS; Unlimited time.

48 "having on March 2, 1938 (Minute No. 93–38), vacated its Order of May 1, 1936, denying the application of Paul R. Heitmeyer, and the related Statement of Facts and Grounds for

Decision, pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission, the Commission, upon its own motion directed that the record in this case be reopened for further hearing and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company (File No. B5–P–1339) and a hearing this day ordered upon the application of the Cheyenne Radio Corporation (File No. B5–P–1499), such further hearing to be held before an Examiner."

4. Pursuant to and in accordance with this action, the Commission authorized the issuance of the following Order:

"At a meeting of the Federal Communications Commission, held at its offices in Washington, D. C. on the 20th day of April, 1938,

"The Commission, having on March 2, 1938, vacated its order of May 1, 1936, denying the application of Paul R. Heitmeyer, and the related Statement of Facts and Grounds for Decision, pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission,

"It is ordered, That the record in this case be reopened for further hearing, such further hearing to be held before an Examiner and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company (File No. B5–P–1339), and a hearing this day ordered upon the application of the Cheyenne Radio Corporation (File No. B5–P–1499). A copy of the notice of hearing containing a Bill of Particulars in each of these cases is attached hereto and hereby made a part of this order.

"By THE COMMISSION,
"T. J. SLOWIE, *Secretary.*"

True and correct copies of the Bills of Particulars authorized by the Commission in each of said applications, are attached hereto as Exhibits and made a part hereof.

5. The applicant Heitmeyer contends that the Opinion and Judgment of the Court was based upon the record already made in the case, and that it entitles him to a decision upon the record as it stood at the time of the appeal. It is submitted that this contention is not sound. If a case be remanded to a Court by a decision entitling
49 one of the parties to an absolute and final judgment, then the lower court is without power to enter into a new trial, but this theory does not follow where a judgment is merely reversed and remanded without more, or where the case is left open for further proceedings generally, as is true in the instant case. Certainly this argument cannot be well made where the primary concern of the Commission is that of the public interest rather than the private interest of any individual applicant. To hold otherwise

might require the Commission to make a final determination upon a record which, in the light of present conditions, is entirely inadequate. Concurrent consideration of the applications of Frontier Broadcasting Company and the Cheyenne Radio Corporation, with the application of Paul R. Heitmeyer, cannot assume a denial of his application. The Commission, under the Communications Act of 1934, is required to consider these applications upon a comparative basis to determine which, if any, will best serve the public interest, convenience, and necessity, and the fact that Mr. Heitmeyer's application was filed prior in time to other applications for the same facilities, does not give him any fixed right as against the reasonable, regulatory power of this Commission, under the Communications Act of 1934 to grant whichever application in its sound discretion and judgment will best serve the public interest, convenience, and necessity. Great Lakes Broadcasting Company v. Federal Communications Commission, 59 App. D. C. 197, 199; Pulitzer Publishing Company v. Federal Communications Commission, — App. D. C. —, 94 F. 2d 249.

Wherefore, Federal Communications Commission prays that this Court deny Paul R. Heitmeyer's "Motion for Rule to Show Cause."

FEDERAL COMMUNICATIONS COMMISSION,
By HAMPSON GARY,
Hampson Gary,
General Counsel.
W. H. BAUER,
William H. Bauer,
Acting Assistant General Counsel.
FANNY NEYMAN,
Fanny Neyman,
Assistant Counsel.

50 ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing Opposition of Federal Communications Commission to the Pleading of Paul R. Heitmeyer for a "Rule to Show Cause" acknowledged this 30th day of April, A. D. 1938.

CLARENCE C. DILL,
Attorney for Appellant.

51 *Exhibit A to opposition*

"To: Paul R. Heitmeyer, Cheyenne, Wyoming.

"You are hereby notified that the Commission has reexamined the above-described application and the record in this case, and has designated the matter for further hearing for the following reasons:

"1. To determine whether the legal, technical, financial, and other qualifications of the applicant have changed in any respect since the original hearing upon this application and, if so, in what respect.

"2. To determine whether the application may be granted within the purview of Section 307 (b) of the Communications Act of 1934, as amended.

"3. To determine the need for service in the area proposed to be served.

"4. To determine whether the site at which the applicant proposes to construct and operate the station will be satisfactory.

"5. To determine whether the equipment which the applicant proposes to use will comply in all respects with the Rules and Regulations of the Commission and will render proper service.

"6. Because of the pendency of other applications from the same City, particularly those of the Frontier Broadcasting Company (Docket No. 4318, File No. B5–P–1339), and the Cheyenne Radio Corporation (Docket No. 5156, File No. B5–P–1499).

"7. Because of the pendency of one application for the same facilities at Cheyenne, i. e., from the Cheyenne Radio Corporation (Docket No. 5156, File No. B5–P–1499).

"8. To determine whether the interests of any other station or applicant may be adversely affected by reason of interference.

"9. To determine whether the granting of the application would serve public interest, convenience, and necessity."

52 *Exhibit B to opposition*

"To: Frontier Broadcasting Company, Cheyenne, Wyoming.

"You are hereby notified that the Commission has reexamined the above-described application and has designated the matter for a hearing de novo for the following reasons:

"1. To determine the legal, technical, financial, and other qualifications of the applicant.

"2. To determine the need for service in the area proposed to be served.

"3. To determine whether the application may be granted within the purview of Section 307 (b) of the Communications Act of 1934, as amended.

"4. To determine whether the site at which the applicant proposes to construct and operate the station will be satisfactory.

"5. To determine whether the equipment which the applicant proposes to use will comply in all respects with the Rules and Regulations of the Commission and will render proper service.

"6. Because of the pendency of other applications from the same City, particularly those of Paul R. Heitmeyer (Docket No. 3161, File No. B5–P–490), and Cheyenne Radio Corporation (Docket No. 5156, File No. B5–P–1499).

"7. To determine whether the interests of any other station or applicant may be adversely affected by reason of interference.

"8. To determine whether the granting of the application would serve public interest, convenience, and necessity."

53 *Exhibit "C" to opposition*

"To: Cheyenne Radio Corporation, Cheyenne, Wyoming:

"You are hereby notified that the Commission has examined the above-described application and has designated the matter for hearing for the following reasons:

"1. To determine the legal, technical, financial, and other qualifications of the applicant.

"2. To determine the need for service in the area proposed to be served.

"3. To determine whether the application may be granted within the purview of Section 307 (b) of the Communications Act of 1934, as amended.

"4. To determine whether the site at which the applicant proposed to construct and operate the station will be satisfactory.

"5. To determine whether the equipment which the applicant proposes to use will comply in all respects with the Rules and Regulations of the Commission and will render proper service.

"6. Because of the pendency of other applications from the same City, particularly those of Paul R. Heitmeyer (Docket No. 3161, File No. B5–P–490), and Frontier Broadcasting Company (Docket No. 4318, File No. B5–P–1339).

"7. Because of the pendency of one application for the same facilities at Cheyenne, i. e., the application of Paul R. Heitmeyer (Docket No. 3161, File No. B5–P–490).

"8. To determine whether the interests of any other station or applicant may be adversely affected by reason of interference.

"9. To determine whether the granting of the application would serve public interest, convenience, and necessity."

54 [File endorsement omitted.]

55 In United States Court of Appeals

* * * * * * *

No. 6762

PAUL R. HEITMEYER, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

Order denying motion for rule to show cause

May 12, 1938

On consideration of the motion for a rule to show cause upon the Federal Communications Commission why it has not complied with the Judgment of this Court heretofore made and entered on December 27, 1937, herein, It is ordered by the Court that the motion be, and it is hereby, denied.

* * * * * * *

56 In United States Court of Appeals for the District of Columbia

No. 6762

PAUL R. HEITMEYER, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Motion to stay mandate and stay order

Filed May 18, 1938

Now comes Paul R. Heitmeyer, Appellant in the above entitled cause by his attorneys, Clarence C. Dill and James W. Gum, and moves the Court, under Rule 24, to Stay the effective date of its Denial of Appellant's Motion for a Rule to the Federal Communications Commission to show cause why the Commission should not proceed in accordance with the judgment of this Court by making a decision on the Record in this case, pending Appellant's application to the U. S. Supreme Court for a Writ of Certiorari. Appellant moves this Court also to direct the Federal Communications Commission to stay further proceedings in this matter for a period of thirty days or until Appellant's Petition for Writ of Certiorari is finally disposed of by the Supreme Court of the United States.

Respectfully submitted.

PAUL R. HEITMEYER,
By (signed) CLARENCE C. DILL,
Clarence C. Dill,
JAMES W. GUM,
Attorneys for Appellant.

57 *To: Federal Communications Commission,*
Washington, D. C.:

NOTICE

Notice is hereby given that the foregoing and annexed Motion is being filed in the United States Court of Appeals for the District of Columbia, May —, A. D. 1938.

PAUL R. HEITMEYER,
By (signed) CLARENCE C. DILL,
Clarence C. Dill,
JAMES W. GUM,
His Attorneys.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing and annexed Motion and Notice thereof received and acknowledged this day of May A. D. 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By (signed) HAMPSON GARY
W H B

[File endorsement omitted.]

58 In United States Court of Appeals

* * * * * * *

No. 6762

PAUL R. HEITMEYER, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

May 23, 1938

Order denying motion for stay

On consideration of appellant's motion to stay the effective date of the opinion and judgment of this Court in this cause and for an order directing the appellee so to do, It is ordered by the Court that the said motion be, and it is hereby, denied.

* * * * * * *

59 In District Court of the United States for the District of Columbia

In Equity No. 67291

PAUL R. HEITMEYER, OGDEN, UTAH, PLAINTIFF

vs.

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE, EUGENE O. SYKES, THAD H. BROWN, PAUL A. WALKER, AND NORMAN CASE AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C., DEFENDANTS

Bill of complaint

Filed May 31, 1938

To the Honorable the District Court of the United States for the District of Columbia:

Comes now the plaintiff, Paul R. Heitmeyer, by his attorneys, Clarence C. Dill and James W. Gum, and respectfully represents to this Court as follows:

1. That during all the times herein mentioned, the plaintiff, Paul R. Heitmeyer, has been and now is a citizen of the United States residing at Ogden, Utah.

2. That the above-named defendants, Frank R. McNinch, T. A. M. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman Case and each of them are citizens of the United States and residents of the District of Columbia, and are duly appointed, qualified, and acting members of the Federal Communications Commission with its offices in the District of Columbia, and that they are sued herein in their official capacities as said Commissioners.

60 3. That the plaintiff brings this Bill of Complaint in his own right for the purpose of having this Court enjoin pendente lite and permanently the enforcement of a certain unlawful, arbitrary, and void order issued by the defendants in a certain cause entitled, "In the Mater of Paul R. Heitmeyer, Cheyenne, Wyoming," as a result of the reversal of the Commission's decision in the case entitled, "Paul R. Heitmeyer, Appellant v. Federal Communications Commission, Appellee, No. 6762, United States Court of Appeals for the District of Columbia, which order if allowed to be enforced will work grave and irreparable injury to this plaintiff, compel him to incur great expense for a new hearing against new parties heretofore entire strangers to the above-named cause and made parties to said cause without authority of law and in defiance of the judgment of the United States Court of Appeals for the District of Columbia in said case, said order being set forth in the following paragraph and marked "Exhibit A."

4. That the said Order was duly made and entered by said defendants and each of them in a certain cause, matter, or application which has been and is now pending before said defendants as said Commissioners of said Federal Communications Commission, said cause being entitled "In the Matter of Paul R. Heitmeyer, Cheyenne, Wyoming," and being docketed and numbered as Federal Communications Commission Docket No. 3161, File No. B5-P-490. That said Order, which is marked "Exhibit A," is in words and figures and follows, to wit:

"Exhibit A

"26884

"Federal Communications Commission, Washington, D. C.

"Docket No. 3161

"In the Matter of Paul R. Heitmeyer, Cheyenne, Wyoming

"For Construction Permit

"*Order*

"At a meeting of the Federal Communications Commission, held at its offices in Washington, D. C. on the 20th day of April 1938.

"The Commission, having on March 2, 1938, vacated its order of May 1, 1936, denying the application of Paul H. Heitmeyer, and the related Statement of Facts and Grounds for Decision, pursuant to and in conformity with the certified copy of Opinion and Judgment of the United States Court of Appeals for the District of Columbia in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission.

"It is ordered, that the Record in this case be reopened for further hearing, such further hearing to be held before an Examiner and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company (File No. B5–P–1339), and a hearing this day ordered upon the applica-
61 tion of Cheyenne Radio Corporation (File No. B5–P–1499).

"A copy of the notice of hearing containing a Bill of Particulars in each of these cases is attached hereto and hereby made a part of this order.

"By the Commission.

"T. J. Slowie, *Secretary.*"

5. That the said defendants, and each of them, by said order did override and disregard the right of plaintiff, and did nullify his right to a decision on the record made in the aforesaid case by consolidating consideration of his application, already heard, decided by the Commission, appealed to the United States Court of Appeals of the District of Columbia, reversed and remanded back to the Commission, with the consideration of the applications of two other parties, whose applications were not filed for consideration for many months after plaintiff's case had been appealed, said other applicants never having been parties to said cause not made parties by consent of the United States Court of Appeals.

6. That the said defendants, and each of them, on April 29, 1938, issued three notices, attached to and made a part of the above order consolidating the three applications, setting said applications for hearing on July 6, 1938, and directing plaintiff to file his Notice of Appearance and Statement of Facts not later than May 14th, 1938, under penalty of being declared in default under Rule 104.6 c of the Commission without right of further consideration by the Commission, said date for filing said Appearance being later extended to June 1, 1938, said Notices being attached hereto, and made a part hereof, and marked "Exhibit B."

7. That the records of the above entitled case show that the plaintiff, Paul R. Heitmeyer, first filed his application for a new radio station at Cheyenne, Wyoming, with the Federal Communications Commission on March 25th, 1935; that the Commission designated the application to be heard before an Examiner October 30, 1935; that the Commission issued Notice of Hearing to all interested parties which included the plaintiff, Donald Lewis Hathaway of Casper, Wyoming, The Wyoming Radio Educational Association of Chey-

nne, Wyoming, and R. R. West of Rock Springs, Wyoming; that he application of plaintiff was consolidated for hearing with the aid Wyoming Radio Educational Association for construction permit; and that said Cheyenne Radio Corporation and said Frontier Broadcasting Company, not being applicants for construction permits at the time of said hearing nor at any time previous to the decision and appeal of this case, were not given notice thereof nor did they appear thereat, nor did they ever appear in connection with his cause until the defendants consolidated the hearing and consideration of their applications with plaintiff's application by the Order and Notice aforesaid and marked "Exhibit A and B" respectively.

8. That at said hearing plaintiff appeared and adduced testimony n person and by witnesses, and introduced into evidence the depositions of certain persons and introduced evidence of certain exhibits n full and complete proof of the issues set forth in the Notice of Hearing as follows, to wit: (1) to determine the legal, tech-
2 nical, financial, and other qualifications of said applicant to construct and operate the proposed station; (2) to determine he need for the additional service in the area proposed to be served; 3) to determine whether the said application might be granted vithin the purview of Section 307 of the Communications Act of 934, and the Regulations of the Commission as to quota, particularly Rule 6 (f); (4) because of the pendency of other applications from he same state or zone; (5) because of the pendency of other applications with which conflict might be had by reason of interference, particularly Palmer Broadcasting Syndicate, Inc.; (6) to determine whether the site at which the applicant proposed to construct and operate the station would be satisfactory; (7) To determine whether he granting of the application would serve public interest, convenience, and necessity; and that at the end of said hearing the Examiner notified all parties that the record was officially closed.

That on December 21, 1935, the said Examiner submitted his Report, No. I–173, to the Commission, recommending upon the evidence adduced upon said issues that the said application of plaintiff e granted, and that the said application of said Wyoming Radio Educational Association be denied. That said Report of said Examiner is attached hereto, made a part hereof, and marked "Exhibit ." That by his "Conclusions," in said Report, the said Examiner ound as follows:

"The applicant is legally, technically, financially, and otherwise qualified to construct and operate the proposed station. A need for additional service such as proposed by the applicant does exist in the area proposed to be served, and this application may be granted vithin the purview of Section 307 of the Communications Act of 934 and the Regulations of the Commission with regard to quota, particularly Rule 6 (f)."

"The Record is silent as to any possible interference with other applications that may be pending from the same state or zone."

"The site at which the applicant proposes to construct and operate the station will conform to the Rules and Regulations of the Commission."

"The granting of this application would serve public interest, convenience and necessity."

9. That on January 22, 1936, said Wyoming Radio Educational Association filed with the Commission its exceptions to the said Examiner's Report, and requested oral argument on its said application. That oral argument was had with counsel for plaintiff and for said Wyoming Radio Educational Association appearing before the Broadcast Division of said Commission, said argument covering both the application of plaintiff and of said Wyoming Radio Educational Association, and occurring on April 23, 1936.

10. That thereafter on May 1, 1936, the Commission made and entered its final order denying both the said application of plaintiff and the said application of the Wyoming Radio Education Association, that the said Order of denial is attached hereto, made a part hereof, and marked "Exhibit D."

11. That on June 29, 1936, plaintiff filed in the United States Court of Appeals for the District of Columbia, his appeal
63 from the said Order, said appeal bearing Number 6762 and being entitled Paul Heitmeyer, Appellant, vs. Federal Communications Commission. That plaintiff hereby refers to the Transcript of Record filed in said appeal on June 29, 1936, and incorporates the same herein; and prays that it be read as a part hereof, as a verbatim account of the material parts of the entire proceedings before said defendants and each of them in the matter of plaintiff's said application.

12. That on December 27, 1937, said United States Court of Appeals for the District of Columbia, handed down its decision reversing the Commission. That said decision made, among others, the following statements:

"Under the circumstances, can it be said that the action of the Commission was anything but arbitrary, if not capricious? We think not; especially as its own findings were insufficient to support its conclusions of law and the decision based thereon . . . . The decision, therefore will be reversed and the case remanded to the Commission with instructions to proceed with the application in conformity with this opinion. This does not mean that it is directed to issue a permit to the appellant. It is not the function of this court "To revise the action of the Commission from an administrative standpoint and to make an administrative judgment . . . the Commission in its further action is to respect and follow the determination of the questions of law by this court."

That plaintiff hereby refers to the said decision of said United States Court of Appeals for the District of Columbia, and hereby incorporates the same herein as though set out verbatim.

13. That said decision of the United States Court of Appeals was never appealed from by defendants or any of them, and that the

same has become a final judgment and decree in said cause under Sec. 402–(e) of the Communications Act of 1934.

14. That on March 3, 1938, the defendants and each of them vacated the prior order of the Commission by issuance of the following order:

"Pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia, received February 23, 1938, in No. 6762, Paul R. Heitmeyer, Appellant v. Federal Communications Commission, the Commission vacated its Order of May 1, 1936 (Minute No. 353), denying the application of Paul R. Heitmeyer for a construction permit to erect a new broadcast station at Cheyenne, Wyoming, to operate on 1210 kc., 100 watts, 250 watts-LS, unltd. time, and the related Statement of Facts and Grounds for Decision, issued June 12, 1936, and directed that the proceedings upon said application of Paul R. Heitmeyer be reopened for further consideration in accordance with the opinion and Mandate of said Court."

That on April 6, 1938, the plaintiff filed a petition with the Commission reviewing the proceedings to date and praying for a corrected decision on the record as made in this cause, which petition used the following language:

"He hereby respectfully petitions the Commission to make a final decision on the record as it now stands by preparing corrected findings of fact and conclusions of law and a new decision in accordance with the Judgment of the Court of Appeals as set forth in its decision reversing the action of the Commission in this case, as
64 provided in Section 403–E in the Communications Act of 1934 as amended."

That on April 20th, 1938, the defendants and each of them, denied the said petition and issued the following release:

"Denied petition for Decision on Record requesting the Commission to 'make final decision on the record as it now stands by preparing corrected findings of fact and conclusions of law and a new decision'."

In the same release and as of the same date the defendants and each of them, made the following announcement:

"The Commission having on March 2, 1938, vacated its Order of May 1, 1936, denying the application of Paul R. Heitmeyer for CP to use 1210 kc., 100 watts, 250 W–LS, Unltd. time, and the related statement of facts and grounds for decision, pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia, in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission, the Commission, upon its own motion, directed that the record in this case be reopened for further hearing and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company, and a hearing this day ordered upon the application of the Cheyenne Radio Corporation, such further hearing to be held before an Examiner."

That on April 20, 1938, the defendants and each of them, issued their order, hereinbefore recited in paragraph 4 or Exhibit "A" ordering plaintiff's application set down for further hearing and consolidated for hearing and consideration with the applications of the Frontier Broadcasting Company and the Cheyenne Radio Corporation, and on April 29, 1938, issued their Notice of Hearing, as recited in Paragraph 6 and attached hereto as Exhibit B.

That on April 27, 1938, plaintiff filed a Motion in the United States Court of Appeals for the District of Columbia asking for a Rule upon the Federal Communications Commission to Show Cause why it had not complied with the judgment of that Court which Motion, on May 12, 1938, the Court denied, without written opinion.

That on May 18, 1938, plaintiff filed a motion with said Court of Appeals for a Stay of Mandate and Stay of Proceedings by the Federal Communications Commission while plaintiff would prepare and file a petition for Writ of Certiorari by the Supreme Court which motion on May 23, 1938, the Court of Appeals denied without written opinion.

15. That this Plaintiff, having exhausted all of his remedies at law and having made demand on the defendants for a decision on the record, an having been denied this demand, and being under order of the Commission to enter upon a new a second hearing with new parties to this cause, presents this Bill of Complaint in Equity to this Court for relief and protection of his rights from being destroyed by said defendants and each of them, who in total disregard of the said direction of said United States Court of Appeals "to proceed with the application in conformity with this opinion," and in total disregard of the further direction of said Court "that the Commission is to respect and follow the determination of law by this Court," have made, entered, and served upon
65 plaintiff their said Order marked Exhibit A herein and their said Notices marked "Exhibit B" herein, and further shows that unless restrained and enjoined by Order of this Court the said defendants will by said Order and said Notices set forth as Exhibits A and B herein, completely avoid and abort the said judgment and decree of said United States Court of Appeals by the following means, to wit:

(a) That said defendants will compel plaintiff to contest a second time for the approval of his said application, said contest to be based upon the relative merits of the qualifications of plaintiff and two new parties, namely, said Frontier Broadcasting Company and said Cheyenne Radio Corporation who are applicants for the identical and similar radio facilities requested by plaintiff, by their respective applications filed long subsequent to the time when plaintiff's said appeal had been taken to said United States Court of Appeals.

(b) That defendants will compel plaintiff to contest a second time for the approval of his said application, said contest being made with the aforesaid new parties who never became, and were never eligible

to become parties to the record on plaintiff's said application before defendants, nor to the record on plaintiff's said appeal to said United States Court of Appeals.

(c) That defendants will compel plaintiff to contest a second time for the approval of his said application, the hearing therefor involving other issues than those upon which defendants and/or the said United States Court of Appeals have already found in favor of plaintiff by a judgment and decree of said Court which has become a final judgment in the cause.

(d) That by said Order and said Notices set forth herein as Exhibits A and B, said defendants will compel plaintiff to adduce new and further testimony on new issues and old issues covering the period of time from May 1, 1936, the date of defendant's said final Order, to July 6, 1938, the date of the said proposed and noticed hearing.

(e) That by their said Order and said Notices set forth herein as Exhibits A and B, defendants will compel plaintiff to contest a new case with new parties who will produce entirely new testimony upon the issues of their said respective applications, which testimony was never submitted to nor considered by said United States Court of Appeals in making its findings upon which it made its Judgment and Decree reversing said final Order of defendants as aforesaid.

(f) That by a process of repeatedly bringing in new parties when their final orders shall have been held arbitrary and void by the Court of Appeals on plaintiff's appeals therefrom in the future, and by the process of demanding from plaintiff additional and further proof on old and new issues for the periods elapsing during said appeals resulting from their further void and arbitrary orders not sustained by substantial evidence, the defendants can and will indefinitely postpone performance of the direction to them from said United States Court of Appeals "to proceed with the application in conformity" with the opinion of said Court; and said defendants can and will indefinitely defer the grant of a license for a radio station to furnish to the people of Wyoming and its capital the radio service for which said United States Court of Appeals has found there is an existing need and that plaintiff is a qualified
66 applicant under the law requiring "a fair, efficient, and equitable distribution of radio service" to each of "several States and communities" (Sec. 307 (b) Communications Act of 1934, as amended).

(g) That by said Order and said Notices set forth herein as Exhibits A and B, said defendants will render null and void the evidence by which plaintiff sustained the general burden of proof imposed upon him as to all the issues set forth in Paragraph 8 hereof, upon which evidence the Commission based favorable findings except as to the financial qualifications of plaintiff and upon which evidence said United States Court of Appeals reversed said defendants by a judgment and decree that has become final in the said cause.

(h) That by said Order and said Notices marked "Exhibits A and B" herein, said defendants will destroy the record which has been and is binding upon defendants and plaintiff in the matter of plaintiff's said application, upon which record said defendants based their void and arbitrary decision and order, and upon which record said United States Court of Appeals based its findings and said judgment and decree of reversal.

(i) That by said Order and said Notices marked "Exhibits A and B" herein the defendants will create a new record for a new decision thereon, thereby violating the direction contained in said judgment and decree of said United States Court of Appeals that "the Commission in its further action is to respect and follow the determinations of the questions of law by this Court"; and said new record will deny to plaintiff a decision based upon the conditions as they were when the original record was made.

(j) That by said Order and said Notices marked "Exhibits A and B" herein, defendants will unjustly, unlawfully, and arbitrarily deny the said application of plaintiff on the record he made and upon which he has at all times been entitled to have a correct decision.

(k) That by said Order and said Notices marked "Exhibits A and B" herein, defendants will compel plaintiff to file appearances and statements of facts in response to said Notices under penalty of defaults against plaintiff under the Rules and Regulations of said Commission whereby no further consideration will be given to the application of plaintiff if he fails to obey said Order and Notice.

16. That Plaintiff is informed and believes and therefore states the fact to be, that unless restrained and enjoined the defendants, their assistants and employees, will cause said Order and said Notices marked "Exhibits A and B" herein to be enforced and carried into effect, and that such enforcement will cause plaintiff great and irreparable loss and injury, whereas temporary restraint thereupon will in no way adversely affect defendants, and that plaintiff is without remedy therefor save in and by this Honorable Court, there being no plain, adequate or complete remedy at law.

17. That plaintiff alleges further that said Order set forth herein as Exhibit A and said Notices set forth herein as Exhibit B cannot, in law, operate to deprive plaintiff of his right to have a decision by said defendants in the matter of his said application in accordance with the directions contained in the said judgment and
67 decree of said United States Court of Appeals for the District of Columbia; and that the said Order and said Notices were and are illegal, arbitrary, and void; that they are a negation of justice and that they deny to plaintiff due process of law and equal protection of the laws of the United States and that they take the property of plaintiff without just compensation in contravention of Articles I and IV of the Constitution and the amendments to the Constitution of the United States.

18. That as stated by Examiner R. W. Seward in his report on the hearing of the application of the Frontier Broadcasting Company held while plaintiff's appeal was pending in the Court of Appeals as aforesaid, the City of Cheyenne will not support more than one broadcasting station, said statement being as follows:

"In view of the fact that the City of Cheyenne could not, when considering the evidence adduced at the Heitmeyer hearing as well as the instant hearing, support two broadcast stations, and the fact that the Heitmeyer application is now on appeal, it is considered that this Commission is not in a position to grant any application for the construction of a radio broadcast station in the City of Cheyenne, Wyoming, until the Heitmeyer case has been finally determined by the Court." (See Examiner Report 1-391, Released April 19, 1937.)

That therefore it is necessary that this Court enjoin the defendants, and each of them, from granting any construction permit or license for a new radio station at Cheyenne, Wyoming, pending a decision on the record in this case.

19. That plaintiff further represents that he is entitled to the issuance of a Writ of Injunction enjoining and restraining the said defendants and each of them, both permanently and pendente lite, from carrying into effect and execution the said void, illegal, and arbitrary Order and Notices herein set forth as Exhibits "A" and "B," thereby depriving plaintiff of his lawful rights as aforesaid.

Wherefore, inasmuch as the Plaintiff is without remedy at law and has no remedy save only in a Court of Equity, the plaintiff respectfully prays that process may issue out of this Court directed unto the above named defendants, Frank R. McNinch, T. A. M. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman S. Case, Commissioners of the Federal Communications Commission, and that they and each of them, be enjoined and restrained from carrying into execution and effect, or causing to be executed or carried into effect against plaintiff their said Order marked "Exhibit A" herein, or their Notices marked "Exhibit B" herein, both pendente lite and permanently, and that defendants, and each of them, be enjoined from granting any construction permit or license to any other applicant for a radio station at Cheyenne, Wyoming, until after they have rendered a decision on the record as made at the said hearings of the application of plaintiff.

That the said Order marked "Exhibit A" herein, and the said Notices marked "Exhibit B" herein, be declared null and void and of no effect.

That the defendants and each of them be ordered and directed to execute and carry into effect the judgment and decree of the
68 Court of Appeals of the District of Columbia in that certain action entitled Paul R. Heitmeyer, Plaintiff, versus Federal Communications Commission, Number 6762, April Term, 1936, by making corrected finding of fact and grounds for decision and a final

decision thereon in accordance with and upon the record in said case as made and presented in said Court of Appeals of the District of Columbia.

That the plaintiff be granted a temporary restraining order without notice to said defendants or any of them, temporarily, restraining said defendants and each of them from executing or carrying into effect or causing to be executed or carried into effect their said Order marked as "Exhibit A," and their Notices marked herein as "Exhibit B."

That a rule to show cause why a preliminary injunction should not be granted to plaintiff be issued against the said defendants and each of them.

That a Writ of Subpoena issue to said Frank R. McNinch, T. A. M. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman S. Case, Commissioners of Federal Communications Commission, requiring them and each of them to appear and answer this Bill of Complaint.

And for such other and further relief as the case may require, and as to this Court shall seem just and meet in the premises.

Respectfully submitted.

PAUL R. HEITMEYER,
By CLARENCE C. DILL,
JAMES W. GUM,
His attorneys.

[*Duly sworn to by Clarence C. Dill; jurat omitted in printing.*]

70 In United States District Court

Motion to dismiss

Filed June 7, 1938

* * * * * * *

Now come Frank R. McNinch, T. A. N. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman Case, as Commissioners of the Federal Communications Commission, and move the Court to dismiss the Bill of Complaint for Injunction pendente lite, and permanently, Rule to Show Cause, and other relief, and respectfully show the Court:

1. Said Bill of Complaint for Injunction on file herein does not set forth facts sufficient in equity to constitute a cause of action;

2. Said Bill of Complaint is defective in that no facts appear therein from which it may be shown that plaintiff is or will be irreparably injured by the acts of defendants of which he complains;

3. That plaintiff has a plain, speedy, and adequate remedy at law;

4. In any event it appears from the face of the Bill of Complaint on file herein, that the matter of which plaintiff complains is res adjudicata;

5. For other reasons apparent of record which will be argued at the hearing.

FRANK R. McNINCH, ET AL.,
As members of the Federal Communications Commission.
By HAMPSON GARY,
(F N)
W. H. BAUER,
FANNEY NEYMAN,
Counsel for Defendants.

In United States District Court

Order denying motion to dismiss

Filed June 30, 1938

* * * * * * *

This cause came on to be heard on the Motion of the Defendants to Dismiss at this term; and thereupon, upon consideration thereof, it is this 30th day of June, 1938,

Adjudged, ordered, and decreed that the Motion to Dismiss be and the same is hereby denied.

PEYTON GORDON, *Justice.*

Dated this 30th day of June 1938.

71 In United States Court of Appeals

* * * * * * *

Original No. 2932, April Term, 1938

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

vs.

PAUL R. HEITMEYER

Order allowing special appeal

July 27, 1938

On consideration of the petition for allowance of a special appeal herein from the order of the District Court of the United States for the District of Columbia entered therein on June 30, 1938, by Mr. Justice Peyton Gordon, It is ordered by the Court that the said petition be, and it is hereby, granted, and a special appeal allowed as prayed, under the terms of the order filed this day in No. 7016, Pottsville Broadcasting Co. v. Federal Communications Commission.

Per Mr. Chief Justice GRONER.

JULY 27, 1938.

72 In United States Court of Appeals for the District of Columbia

No. 7228

FRANK R. McNINCH, T. A. CRAVEN, GEORGE H. PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS

v.

PAUL R. HEITMEYER, APPELLEE

Special Appeal from the District Court of the United States for the District of Columbia

Argued January 9, 1939—Decided April 3, 1939

Hampson Gary, William H. Bauer, Fanney Neyman, and Andrew G. Haley, all of Washington, D. C., for appellants.

Clarence C. Dill and James W. Gum, both of Washington, D. C., for appellee.

Before GRONER, C. J., and STEPHENS and EDGERTON, JJ.

Opinion

GRONER, C. J.: This case is here on a special appeal which we granted and assigned for argument with Pottsville Broadcasting Company v. Federal Communications Commission, decided today. The two cases have many aspects in common.

In 1935 Heitmeyer (appellee) applied for a permit to construct a radio broadcasting station at Cheyenne, Wyoming. The application was referred to an examiner for hearing, and in October, 1935, it was heard together with the application of Wyoming Radio Educational Association for a permit to construct a similar station at Cheyenne. The examiner recommended that Heitmeyer's application be granted and that the Association's application be denied. The Commission then considered Heitmeyer's application and denied it. He appealed, and in December, 1937, we reversed. 95 F. 2d 91, 68 App. D. C. 180. He then filed a petition with the Commission in which he asked that it make a final decision on the record "as it now stands." The Commission rejected this application and ordered that the record be reopened for further hearing, to be held before an examiner and consolidated with the hearings de novo upon the applications of Frontier Broadcasting Company and Cheyenne Radio Corporation. Heitmeyer then applied to this court for a rule "to show cause," which we denied, following which he filed in the United States District Court this bill of complaint, asking that the Commission be permanently enjoined from granting any construction permit or license to any other applicant for a radio station at Cheyenne until after the Commission had rendered decision on the record

73 as made at the original hearings. He also asked the court to order the Commission to execute and carry into effect the judgment and decree of this court. The Commission moved to dismiss the bill for lack of jurisdiction and, when this motion was denied, we allowed an appeal. The parties stipulated that the Commission shall not grant any other application for Cheyenne pending final decision in this case.

The only substantial difference between Heitmeyer's case and the Pottsville case is that in the former the Commission, instead of passing upon all the issues set down for hearing before the examiner—namely, (1) determination of the applicant's legal, technical, and financial qualifications; (2) the need for additional service at Cheyenne; (3) whether the grant of the application would interfere with the quota provision; (4) the question of interference with other stations; and (5) the suitability of the site or location of the apparatus—denied the application on the single ground that the applicant's financial qualifications were not shown to be such as to warrant issuing a license to him and made no findings as to the other matters in issue. We reversed that decision, and remanded the case with instructions to proceed with the application in conformity with our opinion. Our judgment imposed on the Commission the duty of rehearing the case on the original record. Sanford Fork & Tool Co., Petitioner, 160 U. S. 247, 255. This is peculiarly true because of the fact that that record, as we have seen, was made upon full hearing of all the issues relative to the applicant's right to a permit. And it was because we understood that the Commission would so proceed that we denied the rule to show cause. It was not then brought to our attention—or, if it was, we overlooked it—that the Commission intended to impose upon appellee the making of an entirely new record, and to make the decision turn upon the relative merits of the qualifications of himself and two new parties who had become applicants for identical facilities since his case was first heard and decided and who, under the Commission's own rules, were not eligible to become parties to the record on appellee's application. By reason of the limited character of the Commission's original order, there remain to be determined by the Commission, upon the remand, the legal and technical qualifications of the applicant, the need of service in the specified area, the question of a satisfactory site, the satisfactory character of the equipment, the question of interference with other stations, and any other question which in accordance with the Commission's rules and regulations must be decided on the question of public interest; but, for reasons stated by us in the Pottsville case, appellee is entitled to have those questions decided upon the original record on which the appeal was based. In the Pottsville case we said that upon a showing of newly discovered evidence or of supervening facts which go to the very right of applicant to have the license, the Commission might apply to us for leave to reopen for these

purposes. But, except in these circumstances, we think the rule announced in the Pottsville case is controlling here, and that the order of the Commission for a hearing on a new and different record and placing new parties on a parity with appellee is erroneous. Upon the showing made, appellee was entitled to apply to us for mandamus or at his election to go forward with the hearing and then appeal. B. & O. Ry. v. United States, 279 U. S. 781–785.

74 Because of the legal remedy thus afforded, we think the bill was without equity. Hence we shall reverse the order of the lower court, and remand with instructions to dismiss the bill, but without prejudice to the application by appellee to us for mandamus if—in view of what we have said—such application is necessary for the protection of his rights.

Reversed and remanded without costs and with instructions to dismiss the bill without prejudice.

75 In the United States Court of Appeals for the District of Columbia

No. 7228. April Term, 1939

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS

vs.

PAUL R. HEITMEYER

[File endorsement omitted.]

Judgment

Filed April 3, 1939

Special Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court, in this cause, be and the same is hereby, reversed without costs, and that this cause be, and it is hereby, remanded to the said District Court with instructions to dismiss the bill without prejudice.

Per Mr. Chief Justice GRONER.

APRIL 3, 1939.

76 [File endorsement omitted.]

77 In United States Court of Appeals for the District of Columbia

No. 7228

McNINCH, ET AL. AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS

v.

PAUL R. HEITMEYER, APPELLEE

Petition for rehearing

Filed April 20, 1939

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

The Federal Communications Commission petitions this Honorable Body to reconsider its opinion of April 3, 1939, reversing and remanding the above-entitled cause to the District Court of the United States for the District of Columbia with instructions to dismiss the bill of complaint without prejudice, and respectfully requests this Court to modify said opinion in the manner and for the reasons hereinafter more fully set forth.

The Commission respectfully submits that certain language in said opinion is an invitation to further prolong unnecessary litigation concerning matters which as between the appellants and ap-
78 pellee herein are res adjudicata. The Commission submits that said opinion should be modified for the further reason that the opinion states that the "rule in the Pottsville case" should be applicable to the controversy between the parties out of which this litigation arose.

SCOPE OF THIS PETITION

The Commission has this day filed a Petition for Rehearing in the case of Pottsville Broadcasting Corporation v. The Federal Communications Commission, No. 7016, requesting this Court to reconsider its decision of April 3, 1939, and to dismiss the petition for writs of prohibition and mandamus in that case.

The instant petition will be confined solely to the question of whether the Court should not, to prevent further needless, expensive, and time-consuming litigation, modify its opinion so as to remove all doubt that appellee herein has no basis for pursuing further his attempt to control the administrative action of the Commission on his application for construction permit. The Court is respectfully referred to the Commission's Petition for Rehearing in the Pottsville case for our reasons in support of our position that the rule as laid down in that case is erroneous. Our Petition in the Pottsville case, it

is submitted, demonstrates that it is beyond the power not only of this Court but of the United States District Court for the District
79 of Columbia by the issuance of writs of prohibition, mandamus, injunction, or any other process to control the purely executive functioning and procedure of the Commission in the execution of its duties to enforce and execute the Communications Act of 1934 as amended.

HISTORY OF LITIGATION BETWEEN APPELLANTS AND APPELLEE

On June 29, 1936, the appellee herein, Heitmeyer, filed with this Court a Notice of Appeal pursuant to the provisions of Section 402 (b) (1) of the Communications Act of 1934 from a decision of the Federal Communications Commission denying his application for a permit to construct a new radio broadcast station at Cheyenne, Wyoming. On December 27, 1937, this Court (Robb, Groner, and Miller, JJ., and Wheat, District judge, sitting) handed down a decision by Miller J., reversing the Commission and remanding the case to the Commission "with instructions to proceed with the application in conformity with this opinion," stating in its opinion "This does not mean that it is directed to issue a permit to the appellant. It is not the function of this Court to revise the action of the Commission from an administrative standpoint and to make an administrative judgment * * * the Commission in its further action is to respect and follow the * * * determination of the questions of law by this Court."

80 On January 14, 1938, the Commission moved to stay the mandate pending application for certiorari to the Supreme Court. The motion was granted on January 14, 1939.

On January 15, 1938, Heitmeyer petitioned this Court for an order "staying the Federal Communications Commission, pending final decision of appellant's cause, from granting construction permit or license for a radio station at Cheyenne, Wyoming, or any construction permit or license which would prevent or seriously interfere with the granting of petitioner's application," setting out that while appellant's case was pending in this Court another application for a station in Cheyenne, Wyoming, had been filed by the Frontier Broadcasting Company, and that this application had been heard, examiner's report made, argued on exceptions to the examiner's report before the Broadcast Division of this Commission, and set for reargument before the full Commission on January 28, 1938, after which this case would be ready for final decision by the Commission. Heitmeyer also pointed out that a second applicant, Cheyenne Radio Corporation,[2] had filed an application requesting the same facilities requested by Heitmeyer and stated that the granting of either of the foregoing applications would seriously prejudice Heitmeyer's ri[illegible]. Heitmeyer also pointed out that the Commission filed a motion

[2] This application has been dismissed and is no longer involved in these proceedings.

81 for a stay of mandate pending application for certiorari to the Supreme Court. Heitmeyer also stated that under the Commission's rules and regulations, all pending applications which conflict with his application might be decided by the Commission before the case then pending before this Court had been finally decided.

On January 20, 1938, this Court, per Mr. Chief Justice Groner, after reciting that the above-mentioned petition of Heitmeyer for stay had been filed and stating that it appeared to the Court that petitioner's application for license at Cheyenne had been, by decision of this Court, ordered to be reconsidered by the Commission and that application had or would soon be made to the Supreme Court for a review of this Court's decision and stating that it further appeared that the granting of an application for a station at Cheyenne on any pending application other than petitioner's would prevent a reconsideration of petitioner's application if the decision of this Court was affirmed by the Supreme Court or if a writ of review was denied, ordered that the Commission stay all further proceedings in relation to a station license at Cheyenne, Wyoming, until final action and decision was had on petitioner's (Heitmeyer's) application.

The certified copy of the Court's opinion and judgment in Heitmeyer v. Federal Communications Commission (No. 6762) was received by the Commission on February 21, 1938.

82 The Commission, on March 3, 1938, moved to vacate the stay order of January 20, 1938, pointing out that the Commission had previously notified the Clerk of this Court that no petition for certiorari would be filed and that the mandate in this case had been issued by the Court and stating as a reason for vacating the stay order "That the Commission, in the exercise of its discretion and judgment, under the Communications Act of 1934, can grant a construction permit only 'if public convenience, interest, or necessity will be served by the construction of the station,' and in deciding the merits of appellant's (Heitmeyer's) application, should not be precluded from considering all pending applications on a comparative basis as affecting the public convenience, interest, or necessity and should be enabled to reopen the record in this case for the purpose of obtaining additional evidence if necessary, and considering all material facts which may be necessary to a final determination of the issues involved, even though occurring subsequent to the making of the original record herein," and alleging further that "the Commission's primary duty is to consider the public interest rather than the private interest of any individual applicant and the Commission, in the event of conflicting applications, should be enabled to consider all pending applications on a comparative basis and grant that application which, in its judgment, would best serve public convenience, interest, or necessity."

83 Heitmeyer, on March 7, 1938, filed a "Motion to Deny Petition to Vacate Stay Order and Answer" arguing vigorously

that the stay order should not be vacated but that he should be given a prior noncomparative consideration on the record which had been made before his first appeal to this Court was taken.

On March 10 the Commission filed an Opposition to Appellant's Motion to Deny Petition to Vacate the Stay Order and argued that the stay order entered went beyond the jurisdiction of this court and was an improper interference with the power of the Federal Communications Commission under the Communications Act of 1934.

This Court, on March 17, 1938, granted the Commission's Motion and vacated the stay order previously entered on January 20th.

The Commission, on April 20, 1938, took the following action as is evidenced by the Minutes of its meeting of that date. (Minute No. 172–38, Federal Communications Commission meeting of April 20, 1938.)

Present: Commissioners McNinch, Chairman; Craven, Payne, Sykes, Brown, and Case.

* * * * * * *

Broadcast matters—hearing docket. The Commission.

In the following case:

Docket No. 3161. File No. B5–P–490. Applicant Paul R.
84 Heitmeyer, Cheyenne, Wyoming. Call letters, NEW. Nature of application, construction permit for new broadcast station to operate on 1210 kc.; 100 watts, 250 watts–LS; Unlimited time.

having on March 2, 1938 (Minute No. 93–38), vacated its Order of May 1, 1936, denying the application of Paul R. Heitmeyer, and the related Statement of Facts and Grounds for Decision, pursuant to and in conformity with the certified copy of opinion and judgment of the United States Court of Appeals for the District of Columbia in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission, the Commission, upon its own motion, directed that the record in this case be reopened for further hearing and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company (File No. B5–P–1339), and a hearing this day ordered upon the application of the Cheyenne Radio Corporation (File No. B5–P–1499), such further hearing to be held before an Examiner.

* * * * * * *

On April 27, 1938, Heitmeyer filed a "Motion for Rule to Show Cause" in this Court, setting out at length the above Order entered by the Commission on April 20, 1938, praying this Court "for a rule upon the Federal Communications Commission to show cause why it has not complied with the judgment of this Court heretofore made and entered by making full and complete findings with
85 grounds for decision and a final order based thereon, and for such other and further relief as to this Court may seem proper." In said motion, Heitmeyer argued at considerable length that the Commission had no power to take any action other than

to reconsider the record originally made prior to his appeal, and to decide the case on that record in conformity with the decision of this Court, and made the following statement: "This is the practice in the lower Courts after reversal of a decision by an Appellate Court. It should apply in this case."

The Commission, on April 30, 1938, filed an Opposition to Heitmeyer's Motion for a "Rule to Show Cause," and in its Opposition set out at length the Minute of the Commission's meeting of April 20, 1938, and argued that in its opinion its statutory duty to grant applications if they serve public interest, convenience, or necessity required it to obtain further information with respect to Heitmeyer and to consider his application on a comparative basis with the applications of Cheyenne Radio Corporation and Frontier Broadcasting Corporation, and argued that Heitmeyer's contention that the rule applicable to cases remanded to a lower Court had no application in the case involved "where the primary concern of the Commission was that of the public interest rather than the private interest of any individual applicant."

86 This Court, on May 12, 1938, denied Heitmeyer's Motion for a Rule to Show Cause. On May 18, 1938, Heitmeyer filed a Motion to stay the effective date of its denial of his Motion for Rule to Show Cause so that he could apply for certiorari. This Motion was denied by the Court on May 23, 1938.

Heitmeyer did not file a petition for certiorari nor did he ask for a rehearing but instead abandoned the case in this court and filed a Bill of Complaint in the District Court for the District of Columbia, requesting that court to grant the relief by way of injunction which this court had refused to grant. The Commission's order of April 20, 1938, which was the basis for Heitmeyer's Motion for Rule to Show Cause in this court, was also the basis for said Bill of Complaint in the District Court, the Commission having in the meantime taken no action whatsoever to amend, revise, or modify in any way said order. The District Court of the United States for the District of Columbia denied a motion by the Commission to dismiss said Bill of Complaint, and the Commission took a special appeal to this court from the denial of its motion to dismiss by the District Court. This court (Groner, C. J., and Stephens and Edgerton, JJ., sitting), in its opinion of April 3, 1939, by Groner, C. J., held the lower court without jurisdiction and reversed and remanded the case with instructions to dismiss the bill without prejudice, basing its

87 opinion upon the theory that Heitmeyer had a legal remedy and that the Bill was therefore without equity, stating:

"Upon the showing made, appellee was entitled to apply to us for mandamus or at his election to go forward with the hearing and then appeal. B. & O. Ry. v. United States, 279 U. S. 781–785."

In the course of its opinion, the court, after reciting the substance of the Commission's order setting Heitmeyer's application for hearing with Frontier and Cheyenne, stated:

"The only substantial difference between Heitmeyer's case and the Pottsville case is that in the former the Commission, instead of passing upon all of the issues set down before the examiner * * * denied the application on the single ground that the applicant's financial qualifications were not shown to be such as to warrant issuing a license to him and made no findings as to the other matters in issue. We reversed that decision, and remanded the case with instructions to proceed with the application in conformity with our opinion. Our judgment imposed on the Commission the duty of rehearing the case on the original record. Sanford Fork & Tool Co., Petitioner, 160 U. S. 247, 255. This is peculiarly true because of the fact that that record, as we have seen, was made upon full hearing of all the issues relative to the applicant's right to a permit.
88 And it was because we understood that the Commission would so proceed that we denied the rule to show cause. It was not then brought to our attention—or, if it was, we overlooked it—that the Commission intended to impose upon appellee the making of an entirely new record, and to make the decision turn upon the relative merits of the qualifications of himself and two new parties who had become applicants for identical facilities since his case was first heard and decided and who, under the Commission's own rules, were not eligible to become parties to the record on appellee's application." [1]

ARGUMENT

A reading of the above in connection with the several motions filed with, and orders made by, this Court, particularly the Motion for Rule to Show Cause, which set out at length the Commission's order complained of, and the Opposition to said motion, which
89 also set said order out at length, leaves no room for doubt that the Commission's intentions were brought to this Court's attention as forcibly as was within the power either of the Commission or Heitmeyer to engage that attention.

There was but one question at issue in Heitmeyer's Motion for Rule to Show Cause and that was whether the Commission's proposal to set his application for further hearing with Frontier and Cheyenne should be prevented by this Court. Certainly, both Heitmeyer and the Commission exhausted every resource at their command to bring the Commission's proposal to the Court's attention.

We then are reluctantly forced to accept the suggestion that this Court vacated, on the Commission's motion and over Heitmeyer's opposition, the stay order which it had entered while the Commission was contemplating application for writ of certiorari, denied Heit-

[1] The following inaccurate factual statements appear in the above quotation. First, under the Commission's Order of April 20, 1938 (and the Court's interpretation of it in the second paragraph of its opinion), Heitmeyer's application was set for "further hearing" so that his application was not going to be considered upon an "entirely new record." Second, only one of the parties involved, Cheyenne Radio Corporation, had applied for the same facilities as Heitmeyer; Frontier Broadcasting Corporation had applied for different facilities in the city of Cheyenne. Third, the Commission has no rule which would make either Frontier Broadcasting Corporation or Cheyenne Radio Corporation ineligible to become parties to the record on appellee's application.

meyer's motion for rule to show cause, and later denied his motion for a stay so that he might ask for a writ of certiorari to have the Court's action on such motion reviewed by the Supreme Court of the United States, without considering the only issue involved, namely, whether the Commission should be prevented by this Court from taking further evidence and from considering other applications which might affect the grant of Heitmeyer's application before finally passing on his application. Heitmeyer did not request a rehearing at the hands of this Court when it vacated its stay order or when it denied his
90 motion for rule to show cause. He did not attempt to go to the Supreme Court when the stay order was vacated, nor did he proceed with his announced intention of asking for a writ of certiorari from the Supreme Court when his motion for rule to show cause was denied. Heitmeyer abandoned entirely his attempt to obtain relief from this Court or the Supreme Court on the 31st day of May 1938, when he filed his suit in the District Court.

We most respectfully and deferentially submit that if there was ever a case which the rule of res adjudicata was designated to control, this is such a case. The question, in substantially its present form, was considered by the Court at the time it vacated the stay order (granted during the period when the Commission was contemplating applying for a writ of certiorari from the Court's reversal of the Commission's original order denying Heitmeyer's application) on the Commission's motion, and over Heitmeyer's vigorous opposition, despite the fact that Heitmeyer urged, and the Commission admitted, that it did not intend to decide his application upon the record on which his appeal was taken. The Court passed upon the question again in precisely the same form in which it was before the District Court and this Court in the present case when Heitmeyer filed his motion for rule to show cause why the Commission's order, which is still outstanding and which has not been changed in any way
91 since before his motion for rule to show cause was filed with this court, should not be set aside. We respectfully submit that at some point there should be an end to litigation on the same issues between the same parties in successive suits. Undoubtedly, if the Court's opinion is permitted to stand in its present form, Heitmeyer will accept the invitation extended to apply anew to this Court for the same relief which this Court denied him eleven months ago in its April 1938 term.

We submit that if there was any doubt about what the effect of the Court's judgment in Heitmeyer's appeal meant that doubt was set at rest by this Court's action in vacating its Stay Order and its action in denying Heitmeyer's motion for rule to show cause and for stay of mandate after this motion was denied. We submit that for this Court now to revise its judgment on Heitmeyer's appeal more than a year later is not only without precedent but is clearly beyond its power, since the October 1937 term (in which it decided that appeal) has expired. For this Court now to entertain an application

to revise its judgment on the motion for rule to show cause, assuming that that motion was in substance and effect a petition for mandamus rather than an attempt after the term of Court had expired to obtain a revision of this Court's judgment on an appeal, is equally without precedent and equally beyond the power of the Court since the April 1938 term has also expired.

92 We respectfully and with all deference further submit that this Court's opinion of April 3, 1939, creates an extremely dangerous precedent which cannot but have the effect of promoting and prolonging, rather than terminating, litigation. The proper recourse and remedy of any party in the event of an unfavorable decision is to apply for a rehearing or to appeal to a higher court, whether the decision complained of is based upon a pronouncement of the Court which the party believed to be an erroneous view of the law or whether the judgment of the Court be based upon a misapprehension of the facts or issues involved which may not be apparent from the Court's decision. Having abandoned his Motion for Rule to Show Cause, Heitmeyer should not now be encouraged or permitted to file a new petition for mandamus simply because this Court now believes that it was the in error through having misconceived or overlooked the issues involved. Errors in judgment on the part of courts should be remedied by a timely petition for rehearing or by appeal to a higher court. If a party fails to take advantage of his appropriate remedy, he should not be permitted, a year or more later, to re-apply for the relief which he was previously denied because the Court may now believe that it was then in error. We know of no exception to the rule of res adjudicata based upon the theory that the Court which entered judgment believes that it erroneously did so either

93 because it overlooked the issues involved or it misconceived the law or for any other reason.

Even if it be assumed that the issue was not specifically raised, which is a difficult assumption to make in view of the above quotations from the pleadings, the settled rule is that the plea of res adjudicata applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation and which the parties exercising reasonable diligence might have brought forward at the time. Even a question which was not given serious consideration either by the Court or counsel in former proceedings must be considered as adjudicated. U. S. ex rel Donner Steel Co., Inc., v. Interstate Commerce Commission, 8 Fed. 2d 905. (Certiorari denied, 270 U. S. 651). The basis for the rule of res adjudicata and the reason for its existence is the desire to terminate at some time litigation between the same parties over the same issues. The question of whether the first suit between the parties resulted in a grossly erroneous judgment is entirely immaterial. If error in the judgment for whatever cause was a basis for an exception to the rule then the rule itself could have no existence. In other words, if the

policy of the rule, namely, the termination of litigation between parties after final judgment has been entered by a court of competent jurisdiction is sound, it must be applied
94 uniformly. There is never any need to invoke the doctrine at all unless one of the parties is seeking to obtain relief on the theory that the prior judgment was incorrect.

It does not seem inappropriate to mention that in all probability Heitmeyer's application would have been finally decided by this Commission before this time if he had proceeded to go to hearing in accordance with the Commission's order rather than institute litigation in an attempt to control the Commission's proceedings. Whether there is any connection between Heitmeyer's determined effort to prevent the Commission from obtaining any further evidence on the question of whether his application should be granted or not, and his apparent belief that if such evidence is obtained his application will be denied, of course, we have no way of knowing. The further proceedings before the Commission pursuant to its order would certainly be less expensive and time consuming than the litigation which Heitmeyer instituted to prevent the proceedings taking place.

Any disposition which the Court might have in other circumstances to waive or create an exception to the rule of res adjudicata should certainly not exist in this case in favor of an applicant for a construction permit for a radio station who has demonstrated a desire to prevent the Commission from passing upon his application in the light of full information and has sought by every means
95 at his command to prevent the Commission from obtaining further information. This is especially true since if the Commission should deny Heitmeyer's application on the basis of any evidence now in the record or later obtained, and in doing so act unlawfully, Heitmeyer has an adequate and speedy remedy by an appeal to this Court.

In order that there be no misunderstanding concerning our position we are not contending that this Court may not overrule a previous decision nor that the Court should not do so in any case in which it appears that a previous decision was wrong. We are contending only that in a subsequent case between the same parties arising out of the same facts and involving the same issues a prior decision is an effective bar to relief.

CONCLUSION

In the light of the matters above set forth, the Commission respectfully prays this court to recall its opinion of April 3, 1939, and to delete therefrom the language indicating that Heitmeyer is entitled to the relief which he sought and was denied once by this court and which he then sought without avail in his action in the District Court. We further respectfully pray this court, for the reasons set out in our Petition for Rehearing in the Pottsville case, to delete from its

opinion of April 3, 1939, the language therein indicating that the rule as announced by this court in its decision of April 3 in the
96 Pottsville case has any application whatsoever to this case. We further respectfully pray this court to amend its opinion of April 3 so as to rest its decision on the ground that Heitmeyer is barred by the rule of res adjudicata from the relief he seeks in the United States District Court for the District of Columbia and on the additional ground that the United States District Court for the District of Columbia is without power, under any circumstances, to grant Heitmeyer the relief he seeks because granting of such relief would constitute unconstitutional encroachment of the Judicial Department of the United States upon the Executive Department of the United States.

Respectfully submitted.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. DEMPSEY, *General Counsel.*
WILLIAM C. KOPLOVITZ,
Assistant General Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition for Rehearing is acknowledged and a copy thereof received this 20th day of April 1939.

———— ————,
Counsel for Appellee.

97 In United States Court of Appeals for the District of Columbia

No. 7228

McNINCH ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS

v.

PAUL R. HEITMEYER, APPELLEE

[File endorsement omitted.]

Opposition to petition for rehearing

Filed April 25, 1939

To the Honorable the Chief Justice and the Associate Justices of the United States Court of Appeals for the District of Columbia:

Paul R. Heitmeyer hereby requests this Honorable Court to deny and dismiss the petition for rehearing, as filed herein April 20, 1939,

by the appellants. In support of this request it is shown that the entire argument in support of the petition for rehearing, Pages 8 to 13, inclusive, is nothing more nor less than a revision and enlargement of the contention made by the appellants herein before this Court, for the past year or more, to the effect that this matter was res adjudicata. This point was strenuously urged in the lower Court and again in this Court (see Page 17 of their brief). There is not one single contention in this last effort any different from, or more clearly presented than, the contention appellants have made ever since the bill of complaint was filed. It is significant to note that in this last effort not one single citation is made to an authority in support of their argument. On Page 12 they have cited one case which was cited at Page 18 of their original brief, but there is not one single new case cited. In other words, it is our contention that all matter presented in this last and final effort are matters that were before the Court when it wrote its opinion, and consequently the petition should be dismissed.

In the case of Boucher vs. Boucher, 3 MacArthur (10 D. C. 453) (1879), this Court held:

"A rehearing will be denied when the views and facts upon which it is asked were argued, fully considered, and decided at the original hearing."

Counsel for the Commission repeatedly allege in their petition for rehearing that this Court's last decision interferes with the administrative powers of the Commission. The fact of the matter is, the decision merely amplifies and clarifies the original position of this Court from which they took no appeal.

Respectfully submitted.

PAUL R. HEITMEYER,
By J. W. GUM,
CLARENCE C. DILL,
JAMES W. GUM,
His Attorneys.

True and correct copy of foregoing received this 25th day of April 1939.

T. J. SLOWIE,
Secretary.

99 In United States Court of Appeals for the District of Columbia

April Term, 1939

No. 7228

FRANK R. McNINCH, T. A. CRAVEN, GEORGE H. PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS

v.

PAUL R. HEITMEYER, APPELLEE

[File endorsement omitted]

Petition for writ of mandamus

To the Honorable the Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

Your petitioner, Paul R. Heitmeyer, respectfully alleges:

I

On April 3, 1939 this Court published an opinion in the above matter by Mr. Chief Justice Groner. Petitioner prays that that opinion be made a part hereof by reference. Petitioner prays also that the entire record now before this Court in connection with this matter be made a part hereof by reference, including the opinion of Mr. Justice Miller herein of December 27, 1937.

II

On April 3, 1939 this Court published an opinion by Mr. Chief Justice Groner in the matter of The Pottsville Broadcasting Company vs. Federal Communications Commission, Appeal No. 7016, the law of which the Court stated in the opinion of April 3, 1939, in this matter, is applicable to this cause. Petitioner prays that that opinion be made a part hereof by reference.

100 III

On April 20, 1939 applicants herein filed with this Court a petition for rehearing that presented no new argument in this cause. This is the only move of record appellants have taken since the Court's opinion herein of April 3, 1939.

IV

Since 1935, petitioner has been prosecuting this cause diligently, in good faith, and at great expense. Yet, even unto this very day, he

has never received a legally correct decision from the appellants herein, as is shown by the records made a part hereof by reference. Now, after nearly four years and two decisions from this Court, appellants have filed a dilatory motion for rehearing instead of proceeding according to the law, as clearly stated by this Court.

V

The people of the City of Cheyenne, Wyoming, are directly affected by the delay in finally disposing of this matter. They will be greatly benefited by a prompt and expeditious settlement of this litigation.

VI

Petitioner avers that as a matter of law, final disposition of this litigation should be made at the earliest reasonable date. The Communications Act of 1934, as amended, provides at Section 307 (a): "* * * shall grant * * *," and this Court has repeatedly pointed out the proper procedure how applicable to the final disposition of this case. In view of this Court's last decision in this cause, and numerous other decisions during the year 1938 relating to findings of fact, we submit there can be no doubt as to how the Commission should proceed further with this matter.

Wherefore, the premises considered, your petitioner prays:

101 1. That a writ of mandamus be issued from this Honorable Court directed to the Federal Communications Commission and the members thereof, commanding it and them

(a) To render a final decision in this case within a time certain, to be fixed by this Court, and in conformity with the judgments of this Court heretofore rendered;

(b) To transmit said final decision and the findings of fact upon which it is based to this Court and petitioner immediately thereafter;

(c) To make full and complete findings of fact, supported by the record, on the legal, technical, and other issues involved herein, as set forth in the original notice of hearing.

2. For such other and further relief as may be appropriate in the premises.

Respectfully submitted.

PAUL R. HEITMEYER,
By JAMES W. GUM,
James W. Gum,
CLARENCE C. DILL,
His Attorneys.

A true and correct copy of the foregoing has been received this 3d day of May 1939.

T. J. SLOWIE,
Secretary, Federal Communications Commission.

102 In United States Court of Appeals for the District of Columbia

No. 7228

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS,

v.

PAUL R. HEITMEYER, APPELLEE

[File endorsement omitted.]

Opposition to petition for writ of mandamus

Filed May 8, 1939

To the Honorable, the Chief Justice, and Associate Justices of the United States Court of Appeals for the District of Columbia:

Come now the Commissioners of the Federal Communications Commission, appellants herein, and in opposition to the Petition for Writ of Mandamus filed in this case by the appellee, Paul R. Heitmeyer, on May 3, 1939, respectfully show this Court:

1. This case is in this Court on a special appeal from the District Court of the United States for the District of Columbia. The case was commenced in that Court by appellee, Paul R. Heitmeyer, filing a Bill of Complaint praying that the Commission be permanently enjoined from holding a further hearing upon his application for a new radiobroadcast station at Cheyenne, Wyoming.

2. The District Court (Mr. Justice Peyton Gordon) granted appellee a temporary restraining order and subsequently denied appellants' Motion to Dismiss the Bill of Complaint. Thereupon appellants took this special appeal.

3. On April 3, 1939, this Court reversed the Order of the lower Court and remanded the case to that Court with instructions to dismiss the Bill, "but without prejudice to the application by appellee to us for mandamus if—in view of what we have said—such application is necessary for the protection of his rights."

4. On April 20, 1939, appellants filed a Petition for Rehearing requesting this Court to modify its Opinion of April 3, 1939, in certain respects as pointed out in said Petition for Rehearing.

103 5. Whether this Court grants appellants' Petition for Rehearing or denies said Petition, appellee's pending Petition for Writ of Mandamus is entirely out of order and frivolous because the action requested therein is unrelated to any issue raised by the special appeal from the Order of the District Court which is the basis for the present proceedings in this Court. The sole question involved in the present appeal is the jurisdiction of the Court below to entertain the Bill of Complaint filed by appellee, which question of law was raised

by the Motion to Dismiss filed in the lower Court by appellants herein, defendants below.

6. The pending Petition for Writ of Mandamus requests action similar to that requested by a Motion made in this appeal by the appellee on August 15, 1938, which this Court denied on October 12, 1938.*

7. The appellee's pending Petition for Writ of Mandamus, insofar as it requests relief different from that which was requested in appellee's Bill of Complaint filed in the District Court, constitutes a proposed amendment of the appellee's original Bill which cannot be made while the case is pending on special appeal in this Court. To the extent that the pending Petition for Writ of Mandamus in effect requests this Court to affirm the Order of the lower Court in this special appeal, it is in the nature of a Petition for Rehearing, and as such was filed too late under this Court's Rule No. 24.

8. Since the pending Petition for Writ of Mandamus was filed in the instant case, it is obviously unnecessary for appellants to point out herein reasons why the relief prayed for should not be granted even if appellee had commenced a new proceeding in this Court, as
104 suggested by the Court in its April 3, 1939, Opinion, or had attempted to file this pleading in the case of Heitmeyer v. The Federal Communications Commission, No. 6762, decided by this Court on December 27, 1937.

For the foregoing reasons appellants respectfully pray that the appellee's Petition for Writ of Mandamus should be denied.

Respectfully submitted.

FRANK R. McNINCH,
T. A. M. CRAVEN,
GEORGE H. PAYNE, ET AL.,
As Commissioners of the Federal Communications Commission.

By WILLIAM J. DEMPSEY,
William J. Dempsey
General Counsel.
WILLIAM C. KOPLOVITZ,
William C. Koplovitz
Assistant General Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Opposition to Petition for Writ of Mandamus acknowledged and a true copy thereof received this 8th day of May 1939.

JAMES W. GUM,
E H
Counsel for Appellee.

* The Motion of August 15, 1938, requested this Court to require the Commission "to file a full and complete statement of findings of fact of a basic or underlying nature herein." This would seem to be the same action as that specified in sub-paragraphs (b) and (c) of the prayer in appellee's pending Petition. In addition, appellee now asks this Court to fix a time limit within which the Commission must take such action (sub-paragraph (a)).

105 In United States Court of Appeals

No. 7228

McNINCH ET AL. AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION, APPELLANTS,

vs.

PAUL R. HEITMEYER.

Order denying rehearing, etc.

May 23, 1939

On consideration of the petition for rehearing herein, It is ordered by the Court that a rehearing be, and it is hereby, denied, but the mandate stayed.

106 In United States Court of Appeals

No. 7228. April Term, 1939

PAUL R. HEITMEYER, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION, FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER

Order that a writ of mandamus issue

May 24, 1939

Upon consideration of the petition for writ of mandamus, and the answer of the respondents; and the court being fully advised in the premises, It is ordered, adjudged, and decreed by the Court that a writ of mandamus issue out of and under the seal of this Court, directed to the Federal Communications Commission and the members thereof, namely, Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith (a) to set aside the order of the Federal Communications Commission dated April 20, 1938, which designated the application of petitioner, Paul R. Heitmeyer, for hearing in consolidation with the applications of the Frontier Broadcasting Company and of the Cheyenne Radio Corporation, and (b)

to hear and reconsider the application of petitioner, Paul R. Heitmeyer, on the basis of the record as originally made and in accordance with the opinions of this Court in No. 6762, filed on December 27, 1937, and in No. 7228, filed on April 3, 1939.

PER CURIAM.

Dated MAY 24, 1939.

107 In United States Court of Appeals

* * * * * * *

No. 7228. April Term, 1939

PAUL R. HEITMEYER, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION, FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER

Order transferring mandamus entries to original docket

May 25, 1939

It is ordered by the Court that the entries respecting the petition of Paul R. Heitmeyer for a writ of mandamus, filed on May 3, 1939, and docketed by the Clerk on the general docket in case No. 7228, and the opposition thereto filed by the Commissioners of the Federal Communications Commission on May 8, 1939, be transferred and the papers docketed by the Clerk on the Original Docket of the Court; the usual costs to be advanced by the petitioner.

PER CURIAM.

Dated MAY 25, 1939.

108 United States Court of Appeals for the District of Columbia

WASHINGTON, D. C., *May 26, 1939.*

WILLIAM H. BAUER, Esq.,
Legal Division, Federal Communications Commission,
Washington, D. C.

DEAR SIR: On May 25, 1939, counsel for the Federal Communications Commission indicated to the Clerk of this Court the desire of the Commission to seek review by the Supreme Court of the order of this Court dated May 24, 1939, directing the issuance of a writ of mandamus on the petition therefor filed by Paul R. Heitmeyer.

This is to inform you that the Clerk of this Court has been instructed to stay the issuance of the writ for 30 days.

Very truly yours,

/s/ JOSEPH W. STEWART,
Clerk.

109 In United States Court of Appeals for the District of Columbia

No. 3102—Original. April Term 1939

PAUL R. HEITMEYER, PETITIONER

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, RESPONDENTS

[File endorsement omitted.]

Petition to vacate order

Filed June 9, 1939

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

Come now the respondents herein and petition this Honorable Body to vacate its order of May 24, 1939, which was entered in the case of Frank R. McNinch, T. A. M. Craven, George H. Payne, et al. as Commissioners of the Federal Communications Commission, appellants v. Paul R. Heitmeyer, appellee, No. 7228, and respectfully request this Court to afford respondents herein an opportunity to file pleadings, submit a brief, and argue orally on the matters involved in the instant case, No. 3102. For the reasons hereinafter more fully set forth, the respondents respectfully submit that they have not been given any opportunity to be heard in the instant case prior to the entry of this Court's final order and that the procedure followed by the Court has deprived respondents of due process of law.

1. The case entitled Frank R. McNinch, T. A. M. Craven, George H. Payne, et al. as Commissioners of the Federal Communications Commission v. Paul R. Heitmeyer, No. 7228, came to this Court on a special appeal from the District Court of the United States for the District of Columbia, which had denied appellants' (respondents in this case) motion to dismiss appellee's (petitioner in this case) bill of complaint in a suit to enjoin the respondents from holding a further hearing on his application for license for a radio broadcast station in Cheyenne, Wyoming.

110 2. On April 3, 1939, this Court reversed the order of the lower court and remanded the case to that court with instructions to dismiss the bill "but without prejudice to the application of appellee to us for mandamus if—in view of what we have said—such application is necessary for the protection of his rights."

3. On May 3, 1939, Heitmeyer filed a paper entitled "Petition for Writ of Mandamus" in Case No. 7228, requesting this Court to order the respondents to render a final decision within a time certain and to perform certain other acts in connection with Heitmeyer's application for radio broadcast station license.

4. On May 8, 1939, the respondents filed an opposition to said "Petition for Writ of Mandamus" pointing out that said petition was out of order and frivolous and could not properly be considered by the Court in Case No. 7228 and should, therefore, be denied. In their opposition to said "Petition for Writ of Mandamus" the respondents explicitly stated that since the petition was filed in Case No. 7228, it was obviously unnecessary for the respondents to point out at that time "reasons why the relief prayed for should not be granted even if appellee had commenced a new proceeding in this Court, as suggested by the Court in its April 3, 1939, opinion * * *."

5. On May 24, 1939, this Court entered an order directing the issuance of a writ of mandamus commanding the respondents to perform certain acts in connection with Heitmeyer's application for a license for a radio broadcast station at Cheyenne, Wyoming. This action was taken in Case No. 7228. On the next day, May 25, 1939, this Court, on its own motion, ordered that "the entries respecting the petition of Paul R. Heitmeyer for writ of mandamus filed on May 3, 1939, and docketed by the Clerk on the general docket in case No. 7228, and the opposition thereto filed by the Commissioners of the Federal Communications Commission on May 8, 1939, be transferred and the papers docketed by the Clerk on the original docket of the Court."

111 6. The effect of the Court's order of May 25, 1939, was to confer retroactively upon the pleading filed by Heitmeyer on May 3, 1939, the status of an initial pleading in an original proceeding.

7. By entering final judgment in Case No. 7228 and then adopting the order of May 25, 1939, the Court foreclosed the respondents from setting forth their reasons why the relief prayed for in Heitmeyer's "Petition for Writ of Mandamus" should not be granted even if it had been filed as the initial pleading in an original proceeding.

8. The action of the Court on May 25, 1939, transferring the papers filed by Heitmeyer in Case No. 7228 to the Court's original docket conclusively demonstrates that the position taken by the respondents in their opposition to Heitmeyer's "Petition for Writ of Mandamus" in Case No. 7228 was sound. Respondents herein interpose no objection to the action of the Court correcting, on its own motion, the obvious error committed by Heitmeyer in filing his "Petition for Writ of Mandamus" in the wrong case, but it is respectfully submitted that the Court should not have foreclosed the respondents from presenting arguments why the relief prayed for should not be granted even if such procedural error had not been committed.

9. By reason of the action taken by this Court on May 25, 1939, the respondents have been foreclosed from pointing out to this Court that even considering the Petition for Writ of Mandamus as the initial pleading in an original proceeding, the relief prayed for should be denied because (1) this Court lacks the Constitutional power to grant the relief prayed for, (2) assuming the existence of such Constitutional power, this Court lacks the statutory power to grant

the relief prayed for, (3) assuming both Constitutional and statutory power to grant relief, this Court is precluded by the doctrine of res adjudicata from granting the relief prayed for, and (4) assuming the aforementioned questions of law in favor of Heitmeyer, the relief prayed for should be denied for other reasons going to the merits of the case.

112 For the foregoing reasons the respondents respectfully pray this Court to vacate its Order of May 24, 1939, and permit respondents to file pleadings and brief and to argue orally why the Petition for Writ of Mandamus considered as the initial pleading in an original proceeding should not be granted.

Respectfully submitted.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, and PAUL A. WALKER, *Respondents.*

By WILLIAM J. DEMPSEY,
William J. Dempsey
General Counsel, Federal Communications Commission.

By WILLIAM C. KOPLOVITZ,
William C. Koplovitz
Assistant General Counsel, Federal Communications Commission.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition to Vacate Order acknowledged and a true copy thereof received this 9th day of June, 1939.

JAMES W. GUM,
By EVE I. HAWKINS,
Counsel for Petitioner.

113 In United States Court of Appeals for the District of Columbia

No. 3102—Original. April Term 1939

PAUL R. HEITMEYER, PETITIONER

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, RESPONDENTS

[File endorsement omitted.]

Opposition to petition to vacate order

Filed June 19, 1939

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

In answer to the petition of respondents herein, filed June 9, 1939, asking this Court to vacate its order of May 24, 1939, Paul R. Heit-

meyer respectfully calls the Court's attention to the provisions of Section 230 of the Annotated Code of the District of Columbia, 1924. In setting up this Court, Congress specifically provided (Section 230 Annotated Code of the District of Columbia, 1924):

"Section 230. Writs—The said Court of Appeals shall have power to issue all necessary and proper remedial *prerogative* writs in aid of its appellate jurisdiction." [Emphasis ours.]

The Court has found it necessary in the past 50 years to exercise the power thus given to them by Congress on several occasions and in such cases as the instant one. During all of this time, the Supreme Court has refused to interfere with the power of this Court thus exercised. The following cases are illustrative of the point:

Mulvihill vs. Clabaugh, 21 App. D. C. 440 (1903), 31 W. L. R. 210;

Slater vs. Willige, 16 App. D. C. 364 (1900), 28 W. L. R. 454;

U. S. ex rel. Beall v. Cox, 14 App. D. C. 368 (1899), 27 W. L. R. 231.

114 See also ex parte Mansfield, 11 App. D. C. 558 (1897); 25 W. L. R. 783;

Hartman vs. Masters, 46 App. D. C. 271 (1917); 45 W. L. R. 246.

In re Macfarland, 30 App. D. C. 365 (1908); dismissed 215 U. S. 614.

In view of this well-established law, it is apparent that the petition of respondents herein is entirely frivolous and without merit worthy of consideration.

Wherefore it is prayed that the petition be dismissed.

Respectfully submitted.

PAUL R. HEITMEYER,
By (S) CLARENCE C. DILL,
Clarence C. Dill,
and JAMES W. GUM,
His Attorneys.

ACKNOWLEDGMENT OF SERVICE

Receipt of a true and correct copy of the foregoing is acknowledged this 19 day of June 1939.

(S) WILLIAM J. DEMPSEY,
Counsel for Federal Communications Commission.

115 In United States Court of Appeals

* * * * * * *

No. 3102 Original

PAUL R. HEITMEYER, PETITIONER

vs.

FRANK R. McNINCH AND OTHERS

Order suspending order

June 20, 1939

Upon consideration of the petition filed herein by the Federal Communications Commission June 9, 1939:

It is ordered by the Court that the Order of this Court of May 24, 1939, directing the issuance of a writ of mandamus, commanding the Commission to perform certain acts in connection with Heitmeyer's application for a license for a radio broadcast station at Cheyenne, Wyoming, be and the same hereby is suspended for a period of ten days from this date, with leave to the Commission within five days to file in this Court its grounds of opposition as outlined in paragraph nine of its said petition and with leave to Heitmeyer to file an answer thereto within the succeeding five days if he shall be so advised;

And it is further ordered that this cause be continued.

JUNE 20, 1939. PER CURIAM.

116 [File endorsement omitted.]

117 In United States Court of Appeals for the District of Columbia

[April Term, 1939]

No. 3102—Original

PAUL R. HEITMEYER, PETITIONER

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, RESPONDENTS

Opposition to petition for writ of mandamus

Filed June 26, 1939

To the honorable the Chief Justice and Associate Justices of the United States Court of Appeals for District of Columbia:

Come now the respondents herein and file their opposition to the Petition for Writ of Mandamus filed in this Court by petitioner on

May 3, 1939, in Case No. 7228 and ordered by the Court on May 25, 1939, to be transferred and docketed by the Clerk on the original docket of the Court as Case No. 3102.

PRELIMINARY STATEMENT

On May 24, 1939, this Court entered an order directing the
118 issuance of a writ of mandamus commanding the Federal Communications Commission and the members thereof to perform certain acts in connection with the petitioner's application for a construction permit for a radio broadcast station at Cheyenne, Wyoming, which is now pending before the Commission. Upon consideration of a petition filed by respondents on June 9, 1939, this Court on June 20, 1939, "suspended" said Order of May 24, 1939, for a period of ten days from June 20, 1939, "with leave to the Commission within five days to file in this Court its grounds of opposition as outlined in paragraph 9 of its said Petition and with leave to Heitmeyer to file an answer thereto within the succeeding five days if he shall be so advised."

Respondents construe the Court's order of June 20, 1939, as meaning that the Court will disregard the order which it entered on May 24, 1939, and will judge this case on the respective merits of Heitmeyer's Petition for Writ of Mandamus, filed May 3, 1939, and respondents' opposition thereto. It is upon the assumption that this is the proper interpretation of the Court's Order of June 20, 1939, that respondents respectfully request the Court to consider the arguments hereinafter made before taking final action on Heitmeyer's Petition for Writ of Mandamus.

NATURE OF THIS PROCEEDING

It is impossible to determine from the reading of Heitmeyer's
119 Petition for Writ of Mandamus upon what basis Heitmeyer is proceeding in this case. The relief prayed for is an order directing the Federal Communications Commission and the members thereof (a) to render a final decision on petitioner's application for a construction permit for a radio broadcast station at Cheyenne, Wyoming, within a time certain to be fixed by the Court and in conformity with the judgments of this Court heretofore rendered; (b) to transmit said final decision and the findings of fact upon which it is based to this Court and to the petitioner immediately thereafter; and (c) to make full and complete findings of fact supported by the record on the legal, technical, and other issues involved in petitioner's application, as set forth in the original notice of hearing.

Only a casual reading of the prayer in Heitmeyer's petition demonstrates how preposterous is the petitioner's request. Respondents believe that no useful purpose would be served by consuming the Court's time in discussing Heitmeyer's prayer for relief insofar as it extends beyond the relief specified by the Court in its Order of

May 24, 1939. It is significant that although the Court had before it no opposition from respondents at the time it acted upon Heitmeyer's petition, the Court did not see fit to grant the relief requested but directed that an order be issued having the effect of
requiring the Commission to hold no further hearing on Heit-
120 meyer's application but to hear and reconsider the same on
the basis of the record as originally made before an examiner of the Commission at a hearing held on October 29 and 30, 1935.

For the purpose of this opposition respondents will construe Heitmeyer's Petition for Writ of Mandamus, as if it requested the relief which was specified by the Court in its Order of May 24, 1939. It is obvious that if the Court should not have issued the Order of May 24, 1939, a fortiori it should not grant the requests in Heitmeyer's petition which go beyond the relief granted in said order.

Respondents, therefore, will assume that, in essence, Heitmeyer is requesting this Court to order the Commission to decide his application for a construction permit for a radio broadcast station in Cheyenne, Wyoming, without holding a further hearing thereon and without considering his application on a comparative basis with that of any other applicant, but instead to decide his application on the record made at the hearing held before an examiner of the Commission on October 29 and 30, 1935. There are two possible theories which might underlie or form the legal basis for a request for an order of this kind. The first is that the order requested from the Court is necessary as a means of construing or enforcing the mandate of the Court in the case of Heitmeyer v. Federal Communications
Commission, No. 6762, decided by this Court on December 27,
121 1937. The second theory is that a mandamus is necessary to
compel respondents to perform a duty imposed upon them by the Communications Act of 1934. There is no other possible theory upon which petitioner could rely in seeking the writ of mandamus directed against respondents, which is requested in this case. As will be shown hereinafter, neither of these theories has any application to the instant case.

HEITMEYER'S PETITION CONSIDERED AS A MEANS OF COMPELLING ENFORCEMENT OF COURT'S MANDATE

If the instant Petition for Writ of Mandamus is considered as a request that this Court enforce its mandate in the Case of Heitmeyer v. Federal Communications Commission, No. 6762, decided on December 27, 1937, the fatal defect in petitioner's position is that the issues sought to be adjudicated in this proceeding were not and could not have been before this Court in the case of Heitmeyer v. Federal Communications Commission, No. 6762. The mandate of the Court in the latter case was directed to action taken by the Commission on June 12, 1936, on Heitmeyer's application for a construction permit to erect a new radio broadcast station at Cheyenne, Wyoming. The only issues involved in that case were those related to the legality

of the Commission's action in denying Heitmeyer's application. The Commission's denial of Heitmeyer's application was based upon a finding that Heitmeyer was not financially qualified to construct and operate the proposed radio broadcast station at
122 Cheyenne. The Commission did not deny the application because of conflict with any other pending application, and upon the appeal taken by Heitmeyer the question of whether his application should have been considered along with the application of Frontier Broadcasting Corporation was not and could not have been in issue.

Action which the Commission took after the reversal of its decision of June 12, 1936, based upon facts occurring subsequent to said decision, could not possibly have been in issue on the appeal from that decision. By no possible reasoning, therefore, can it be said that the issue sought to be adjudicated at the present time was covered by the mandate and decision of this Court rendered on December 27, 1937. In fact, Heitmeyer on April 30, 1938, applied to this Court for a rule to show cause, contending that the Court's mandate was not being followed by the Commission in setting Heitmeyer's application down for further hearing. The Court on May 12, 1938, refused to interfere with the Commission's further proceedings on Heitmeyer's application, although it was pointed out to the Court that the Commission intended to hold a further hearing on Heitmeyer's application. Not a single additional step has been taken or act performed by the Commission on Heitmeyer's application since May 12, 1938. If the Court did not consider that its mandate needed clarification or was being disregarded on May 12, 1938, and the Commission
123 has not performed a single act with reference to Heitmeyer's application since that date, it is difficult to understand how it can be held that the Court's mandate needs clarification or enforcement at the present time.

The issues decided in the case of Heitmeyer v. Federal Communications Commission, No. 6762, as between the petitioner and respondents are finally adjudicated. Respondents will, of course, follow and respect the law as laid down by the opinion of the Court in that case in any further proceedings upon Heitmeyer's application. It has not evidenced the slightest intention of any proposal to do otherwise. Certainly it cannot be argued that because the Commission believes that further facts should be obtained before it can make the determination concerning public interest, convenience, and necessity which it is required to make under the statute, that it will, in acting upon such additional facts as it may secure, deviate from the law as announced by this Court in that case.

If the further action proposed to be taken by the Commission on Heitmeyer's application constitutes a violation of this Court's mandate in Heitmeyer v. Federal Communications Commission, No. 6762, it is not because such action contemplates a comparative consideration of Heitmeyer's application with that of the Frontier Broadcasting Corporation, since the departure from the Court's mandate ac-

124 cording to Heitmeyer's contentions was the setting of Heitmeyer's application for further hearing. In other words, the Commission would be violating the Court's mandate under Heitmeyer's theory whether Heitmeyer's application is set down for further hearing by itself or whether it is set down for further hearing along with the application of some other applicant. Heitmeyer's position, therefore, boils down to the simple proposition that the Commission is without power to obtain further facts concerning his application before acting thereon, notwithstanding that the only facts now before the Commission pertaining to his application are those adduced at a hearing held on his application on October 29 and 30, 1935. Obviously, it would be impossible for respondents to make a finding of public interest, convenience, and necessity in 1939 based upon evidence adduced in October 1935 pertaining to circumstances and conditions existing prior to that time. If the Court grants Heitmeyer's petition it will be ordering the respondents to perform a useless and meaningless act, since there are not now before the Commission facts upon which an intelligent judgment can be reached.

If a hearing were held today on an application for a construction permit to erect a radio broadcast station in Cheyenne, Wyoming, and the applicant offered evidence at such hearing only as to circumstances and conditions existing in that community prior to October 1935, it is questionable whether such evidence could be accepted
125 as relevant. Certainly such evidence could not properly be accepted as the sole basis for a finding that the public interest, convenience, and necessity would be served today by granting the application, in the absence of a showing that circumstances and conditions which existed in Cheyenne, Wyoming, prior to October 1935 have not changed substantially since that time. In the instant case the granting of Heitmeyer's Petition for Writ of Mandamus would necessarily preclude respondents from obtaining evidence bearing upon the question of whether circumstances and conditions shown by Heitmeyer to have existed in 1935 have not changed since that time.

HEITMEYER'S PETITION CONSIDERED AS A MEANS OF COMPELLING RESPONDENTS TO COMPLY WITH A DUTY IMPOSED BY THE COMMUNICATIONS ACT OF 1934

If the instant Petition for Writ of Mandamus is considered as a proceeding to compel respondents to comply with a duty imposed by the Communications Act of 1934, there are four equally cogent and independent arguments why the petitioner must fail.

1. THE COURT LACKS THE CONSTITUTIONAL POWER TO GRANT THE RELIEF PRAYED FOR

This Court cannot constitutionally issue the writ of mandamus as prayed for by Heitmeyer because to grant the relief requested requires the exercise of a nonjudicial function. This Court is

invested with the judicial power of the United States.
126 O'Donoghue v. United States, 289 U. S. 560. It is a fundamental principle of constitutional law that the judicial power of the United States and the executive power of the United States cannot be exercised by a single body. The question upon which Heitmeyer and respondents are at issue is whether Heitmeyer's application should be heard along with the application of the Frontier Broadcasting Corporation before respondents decide whether or not the public interest, convenience, and necessity would be served by the granting of Heitmeyer's application. By any possible test which can be imagined, the determination of this question is an executive and not a judicial function. The question does not involve the settlement of the respective rights of Heitmeyer and the Frontier Broadcasting Corporation, but rather the question of whether the mandate of Congress contained in the Communications Act of 1934 can best be carried out by acting upon the Heitmeyer application without considering it along with the Frontier application. For the Court to substitute its judgment for the Commission's as to the proper procedure in such a case would be tantamount to the Court acting in an executive capacity.

2. THE COURT LACKS THE STATUTORY POWER TO GRANT THE RELIEF PRAYED FOR

Assuming that it would be constitutional for Congress to authorize this Court to grant relief such as is prayed for in Heitmeyer's
127 petition, the Court lacks the statutory power to entertain the petition. The Court's statutory power to entertain petitions for writs of mandamus is contained in Section 230 of the Annotated Code of the District of Columbia, 1924. In setting up this Court, Congress specifically provided:

Sec. 230. Writs—The said Court of Appeals shall have power to issue all necessary and proper remedial, prerogative writs in aid of its *appellate* jurisdiction. [Emphasis ours.]

In the instant case, petitioner cannot invoke the jurisdiction of this Court under said Section 230 because the appellate jurisdiction of this Court is not involved in this proceeding. An "appeal" to this Court under Section 402 (b) of the Communications Act of 1934, as amended, does not invoke the appellate jurisdiction of this Court within the meaning of said Section 230. Although denominated an "appeal," a proceeding instituted in this Court under Section 402 (b) of the Communications Act of 1934, as amended, is an original suit. The Federal Communications Commission is not a nisi prius Court. In the constitutional sense the Commission performs solely an executive function. Prior to 1930 this Court exercised what might be termed an appellate jurisdiction over decisions of the Commission in the sense that it performed a function of essentially the same nature as did the Commission, namely, executive, and

its jurisdiction was invoked by way of appeal to set aside
128 action taken by the Commission. Since the amendment of
1930 the function of the Court with respect to actions of the Commission has not been to supervise or review the decisions of the Commission as an appellate body performing the same character of function, but on the contrary the Court now entertains suits in which the validity of Commission decisions are for the first time brought under the scrutiny of a judicial body. Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266. There is no statute which authorizes this Court to issue writs of prohibition and mandamus in an original proceeding instituted by a party seeking the type of relief desired by the petitioner in this case. In the absence of statutory authority to grant the relief prayed this Court should dismiss the petition.

3. ASSUMING BOTH CONSTITUTIONAL AND STATUTORY POWER TO GRANT THE RELIEF PRAYED FOR, THIS COURT IS PRECLUDED BY THE DOCTRINE OF RES ADJUDICATA FROM GRANTING HEITMEYER'S PETITION

The further hearing on Heitmeyer's application and the application of Frontier Broadcasting Corporation was directed by a minute adopted by the Federal Communications Commission on April 20, 1938. On April 27, 1938, Heitmeyer filed in this Court "Motion for Rule to Show Cause" setting out at length the fact that the Commission had adopted the minute of April 20, 1938, and requested this Court for a "rule upon the Federal Communi-
129 cations Commission to show cause why it had not complied with the judgment of this Court heretofore made and entered by making full and complete findings with grounds for decision and a final order based thereon, and for such other and further relief as to this Court may seem proper." In said motion Heitmeyer argued at considerable length that the Commission had no power to take any action other than to consider the record originally made on his application prior to his appeal and to decide the case on that record in conformity with the decision of this Court and made the following statement: "This is the practice in the lower courts after a reversal of a decision by an appellate court. It should apply in this case."

The Commission, on April 30, 1938, filed an opposition to Heitmeyer's "Motion for a Rule to Show Cause" and in said opposition set out at length the minute of the Commission's meeting of April 20, 1938, and argued that in its opinion its statutory duty to grant applications, if they serve public interest, convenience, or necessity, required it to obtain further information with respect to Heitmeyer and to consider his application on a comparative basis with the applications of Cheyenne Radio Corporation [5] and Frontier Broadcasting Corporation, and argued that Heitmeyer's contention that the

[5] This application has been dismissed and is no longer involved in these proceedings.

130 rule applicable to cases remanded to a lower court had no application to the instant case "where the primary concern of the Commission was that of public interest rather than the private interest of any individual applicant."

This Court on May 12, 1938, denied Heitmeyer's Motion for Rule to Show Cause. On May 18, 1938, Heitmeyer filed a motion to stay the effective date of the denial of his Motion for Rule to Show Cause so that he could apply for certiorari. This motion was denied by this Court on May 23, 1938. Heitmeyer did not request certiorari.

There was but one question at issue in Heitmeyer's Motion for Rule to Show Cause which issue was precisely the same as the issue now presented to this Court by the petition filed by Heitmeyer on May 3, 1939, that is whether the Commission's proposal to set Heitmeyer's application for further hearing should be prevented by this Court. If there ever was a case where the doctrine res adjudicata is applicable, it is in the instant case. This Court passed upon the only issue involved in the present proceeding when it denied Heitmeyer's Motion for Rule to Show Cause why the Commission's action, which is still in effect and which has not been changed in any respect since it was first adopted before said Motion for Rule to Show Cause was filed with this Court, should not be set aside.

It is respectfully submitted that at some point there should be an end to litigation on the same issues between the same parties
131 in successive suits. The proper recourse and remedy of any party in the event of an unfavorable decision is to apply for a new trial or a rehearing or to appeal to a higher court, whether the decision complained of is based upon a pronouncement of the Court which the party believe is erroneous in law or whether the judgment of the Court be based upon a misapprehension of the facts or the issues involved which may be apparent from the Court's decision or whether error on some other basis is claimed. Having failed to apply for certiorari after this Court denied his motion for rule to show cause, Heitmeyer should not now be permitted to file a new petition for mandamus in order to urge that this Court may have misconceived or overlooked some or all of the facts or issues involved in the case when it took action on his motion. Errors in judgment on the part of courts should be remedied by a timely petition for a new trial or rehearing or by an appeal to a higher court. If a party fails to take advantage of his appropriate remedy, he should not be permitted, a year or more later, to reapply for the relief which he was previously denied because the court may later believe that it was previously in error. We know of no exception to the rule of res adjudicata based upon the theory that a court which enters judgment later may believe that it erroneously did so either because it overlooked issues, or misconceived the law, or for any other reason.

132 Respondents do not contend that this Court may not overrule a prior decision or that the Court may not refuse to follow

one of its prior decisions in a case in which it appears that its prior decision was wrong. We are contending, however, that in a subsequent case between the same parties arising out of the same facts and involving the same issues, a prior decision is an effective bar to a readjudication of such issues.

4. ASSUMING THE QUESTIONS OF LAW DISCUSSED ABOVE ARE DECIDED IN FAVOR OF HEITMEYER, THE RELIEF PRAYED FOR SHOULD BE DENIED FOR REASONS GOING TO THE MERITS OF THE CASE

Assuming there is no constitutional bar to the issuance of the relief prayed for, that there is a statutory basis for entertaining a petition for a writ of mandamus in the instant case and that the court is not precluded by the doctrine of res adjudicata from granting the relief requested, another and equally fatal obstacle to the granting of Heitmeyer's petition is that this is not a proper case for the issuance of a writ of mandamus. It is unnecessary to cite cases in support of the proposition that mandamus will lie to compel an officer of the government to perform an act only where the duty to perform such act is clear and unambiguous. There is nothing in the Communications Act of 1934 which even purports to impose a duty upon the Commission in a case of this kind. The question at issue
133 in this case is one which calls for the exercise by the Commission of its authority under Section 4 (j) to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and the ends of justice." Certainly mandamus will not lie to compel the Commission to interpret this provision of the statute in a particular way. The Commission has no rule governing the conduct of proceedings after a case has been taken to this Court and a decision of the Commission has been reversed. It is possible that in some cases the Commission would determine that the procedure most conducive to the ends of justice and to the dispatch of its business would be to consider an application upon the record as originally made before the appeal was taken and to decide the application on that basis. In the instant case the Commission deemed it appropriate to set Heitmeyer's application down for further hearing along with the application of the Frontier Broadcasting Corporation. To say that this conduct of the Commission is so clearly a violation of a statutory duty as to permit the issuance of a mandamus to control the action of the Commission is to overlook the essential and fundamental purpose of a mandamus. The determination of whether or not a further hearing is necessary on the Heitmeyer application does not call for the performance of a ministerial act but requires the exercise of the discretion vested by the Communications Act
134 of 1934 in the Federal Communications Commission as the agency authorized to enforce and execute the statute. Since the action sought to be compelled is not ministerial but, on the contrary, requires the exercise of a sound discretion, mandamus does not lie to control its performance.

CONCLUSION

It is respectfully submitted that for the reasons stated above this Court should deny Heitmeyer's petition for writ of mandamus.

Respectfully submitted.

Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, by William J. Dempsey, General Counsel, Federal Communications Commission; William C. Koplovitz, Assistant General Counsel, Federal Communications Commission.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Opposition to Petition for Writ of Mandamus" and receipt of a true copy thereof is hereby acknowledged this — day of June 1939.

———— ————,

Counsel for Petitioner.

135 In United States Court of Appeals for the District of Columbia

No. 3102—Original. April Term 1939

PAUL R. HEITMEYER, PETITIONER

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, RESPONDENTS

[File endorsement omitted.]

Motion for leave to appear and be heard

Filed July 6, 1939

To the Honorable the Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

Come now the respondents herein and move this Honorable Body to grant respondents permission to appear and be heard in the above-entitled cause. In support of this motion, respondents respectfully show:

1. On May 24, 1939, this Court entered an order in this cause directing the issuance of a writ of mandamus commanding respondents to perform certain acts in connection with Heitmeyer's application for a construction permit for a radio broadcast station at Cheyenne, Wyoming.

2. On June 9, 1939, respondents filed a petition praying that this Court vacate its Order of May 24, 1939, and permit respondents to file pleadings and briefs and to argue orally why the Petition for Writ of Mandamus filed by Heitmeyer on May 3, 1939, should not be granted.

3. On June 20, 1939, this Court suspended its Order of May 24, 1939, for a period of ten days from June 20, 1939, with leave to respondents within five days to file their grounds of opposition and with leave to Heitmeyer to file an answer thereto within the succeeding five days.

4. Within the time allowed by the Court in its Order of June 20, 1939, respondents filed an opposition to Heitmeyer's Petition for Writ of Mandamus.

5. Respondents have this day filed with the Court a Petition to Vacate the Court's Order of May 24, 1939, or to suspend said order for such additional time as may be necessary in order that respondents may have an opportunity to argue orally why Heitmeyer's Petition for Writ of Mandamus should be denied, before this Court takes final action on said petition.

136 6. Respondents desire to avail themselves of an opportunity to appear and be heard in this cause, such as is afforded litigants before this Court generally under its Rule No. 8, before final action is taken by the Court.

For the foregoing reasons, respondents respectfully pray this Court to permit respondents to appear and be heard on the issues involved in this cause before the Court takes final action herein.

Respectfully submitted.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, and PAUL A. WALKER,

WILLIAM J. DEMPSEY,

By William J. Dempsey,

General Counsel,

Federal Communication Commission.

WILLIAM C. KOPLOVITZ,

William C. Koplovitz,

Assistant General Counsel,

Federal Communications Commission.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Motion for Leave to Appear and Be Heard" acknowledged and a true copy thereof received this 6th day of July 1939.

JAMES W. GUM,

EH

Counsel for Petitioner.

137 In United States Court of Appeals for the District of Columbia

No. 3102—Original. April Term 1939

PAUL R. HEITMEYER, PETITIONER

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, RESPONDENTS

[File endorsement omitted.]

Petition to vacate or further suspend order

Filed July 6, 1939.

To the Honorable the Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

Come now the respondents herein and petition this Honorable Body to vacate or further suspend its Order of May 24, 1939, directing the issuance of a writ of mandamus commanding respondents to perform certain acts in connection with Heitmeyer's application for construction permit for a radiobroadcast station at Cheyenne, Wyoming, until respondents have been given a full hearing on the question of whether the Petition for Writ of Mandamus filed by Heitmeyer on May 3, 1939, or the relief specified in said Order of May 24, 1939, should be granted. In support of this petition, respondent respectfully show:

1. On May 24, 1939, this Court entered an order directing the issuance of a writ of mandamus commanding respondents to perform certain acts in connection with Heitmeyer's application for a construction permit for a radiobroadcast station at Cheyenne, Wyoming.

2. Upon consideration of a petition filed by respondents on June 9, 1939, this Court suspended its Order of May 24, 1939, for a period of ten days from June 20, 1939, with leave to respondents within five days to file their grounds of opposition and with leave to Heitmeyer to file an answer thereto within the succeeding five days.

3. The period for which the Court's Order of May 24, 1939, was suspended has now expired and unless said order is vacated or suspended further, respondents will be under compulsion of an order which was entered before respondents had been given a full and fair hearing.

138 4. The petition filed by respondents on June 9, 1939, prayed that this Court vacate its Order of May 24, 1939, and permit respondents to file pleadings and briefs and to argue orally why Heitmeyer's Petition for Writ of Mandamus should not be granted. The

Court's Order of June 20, 1939, suspending the Order of May 24, 1939, for ten days did not advert to respondents' statement of their desire to have oral argument. Respondents do not choose to submit this case on briefs, especially in view of the fact that the five-day period allowed by the Court's Order of June 20, 1939, for the filing of an opposition to Heitmeyer's petition did not afford respondents opportunity to do more than merely point out reasons why said petition should be denied. In view of the further fact that this Court in the case of The Courier Post Publishing Company v. Federal Communications Commission, No. 3118—Original, entered a final order on June 30, 1939, without having afforded respondents in that case an opportunity to appear and be heard why the relief prayed for should not be granted, respondents deem it essential in the instant case to emphasize that they do not waive their right to oral argument as a part of a full hearing before the Court takes final action in this case. Respondents desire to avail themselves of the opportunity to appear and be heard which is afforded litigants before this Court generally under its Rule No. 8.

For the foregoing reasons respondents respectfully pray this Court to vacate its Order of May 24, 1939, or to suspend said order for such additional time as may be necessary in order that respondents may have an opportunity to argue orally why Heitmeyer's Petition for Writ of Mandamus should be denied before the Court take final action on said petition.

Respectfully submitted.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, and PAUL A. WALKER.

WILLIAM J. DEMPSEY,
By William J. Dempsey
General Counsel,
Federal Communications Commission.

WILLIAM C. KOPLOVITZ,
William C. Koplovitz
Assistant General Counsel,
Federal Communications Commission.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Petition to Vacate or Further Suspend Order" acknowledged and a true copy thereof received this 6th day of July 1939.

JAMES W. GUM,
Counsel for Petitioner.

139 In Court of Appeals for the District of Columbia

No. 3102—Original. April Term, 1939

PAUL R. HEITMEYER, PETITIONER,

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, RESPONDENTS

[File endorsement omitted.]

Opposition to Petition to vacate or further suspend order

Filed July 11, 1939

To the Honorable, the Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

Paul R. Heitmeyer, by his attorneys of record, hereby petitions and requests the Court to deny the "Petition to Vacate or Further Suspend Order," as filed in this cause by the Federal Communications Commission on July 6, 1939. After carefully reading and considering this last petition, it would seem to be an imposition on the Court to file any extended opposition inasmuch as the petition sets forth nothing more than are statement of the same contentions made repeatedly in this case by the Commission in its petitions and briefs to this Court during the past two years. Every argument and statement contained therein has heretofore been passed upon adversely by this Court. Consequently, it seems perfectly clear to us that the petition is not worthy of consideration and should be dismissed forthwith as entirely frivolous.

Respectfully submitted.

PAUL R. HEITMEYER
By JAMES W. GUM,
CLARENCE C. DILL,
JAMES W. GUM,
His Attorneys.

140 Service of the foregoing Opposition acknowledged and a true copy thereof received this 11th day of July, 1939.

WM. J. DEMPSEY,
Counsel for the Federal Communications Commission.

141 In United States Court of Appeals

* * * * * * *

No. 3102 Original

PAUL R. HEITMEYER, PETITIONER,

vs.

FRANK R. McNINCH AND OTHERS

Order denying motions, etc.

July 12, 1939

Upon consideration of respondents' petitions filed July 6, 1939, or, in lieu thereof, further to suspend the same pending oral argument, and (b) or oral argument; and the Court having considered respondents' opposition filed June 26, 1939, to petition for writ of mandamus herein; and the Court being of opinion, after due consideration thereof, that both motions of July 6th should be denied and that the order of May 24, 1939, should remain in full force and effect.

It is ordered that the order of May 24, 1939, be, and it is hereby, continued in full force and effect; and that said motions be, and they are hereby, denied.

PER CURIAM.

Dated JULY 12, 1939.

142 In United States Court of Appeals for the District of Columbia

No. 3102 Original

PAUL R. HEITMEYER, PETITIONER

v.

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, PAUL A. WALKER, RESPONDENTS

[File endorsement omitted.]

Designation of record

Filed Aug. 10, 1939

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. This Court's opinion in No. 6762, Paul R. Heitmeyer, Appellant, v. Federal Communications Commission, rendered December 27, 1937.

2. This Court's judgment in the same case, filed December 27, 1937.

3. Petition for Stay filed by Paul R. Heitmeyer January 15, 1938, praying for an order from this Court staying the Federal Communications Commission "pending final decision of appellant's cause from granting construction permit or license for radio station at Cheyenne, Wyoming, or any construction permit or license which would prevent or seriously interfere with the granting of petitioner's application."

4. Order of this Court of January 20, 1938, granting Petition for Stay.

5. Motion of Federal Communications Commission of March 3, 1938, to Vacate Stay Order.

6. Motion of Paul R. Heitmeyer, filed March 7, 1938, to deny Motion of Federal Communications Commission to Vacate Stay Order and Answer of Paul R. Heitmeyer to said Motion.

143 7. Opposition of Federal Communications Commission, filed March 10, 1938, to Appellant's Motion to Deny Petition to Vacate Stay Order.

8. Minute Entry of March 17, 1938, evidencing action of this Court granting Federal Communications Commission's Motion to Vacate Stay Order.

9. Motion for Rule to Show Cause filed April 27, 1938, by Paul R. Heitmeyer.

10. Opposition of Federal Communications Commission filed April 30, 1938, to the pleading filed by Paul R. Heitmeyer for a "Rule to Show Cause."

11. Minute Entry of this Court evidencing its action of May 12, 1938, in denying Motion for Rule to Show Cause filed by Paul R. Heitmeyer.

12. Motion for Stay of Mandate and Stay Order filed by Paul R. Heitmeyer May 18, 1938.

13. Minute Entry of this Court of May 23, 1938, evidencing its action in denying Motion of Paul R. Heitmeyer for Stay of Mandate and for Stay Order.

14. Bill of Complaint for Injunction in No. 67291, Paul R. Heitmeyer, Plaintiff, v. Frank R. McNinch et al., as Commissioners of the Federal Communications Commission, Defendants, in the District Court of the United States for the District of Columbia, filed May 31, 1938, as contained in the record filed in this Court in No. 7228.

15. Motion to Dismiss filed June 7, 1938, by Defendants in the case of Paul R. Heitmeyer v. Frank R. McNinch et al., but excluding Statement of Specific Points and Propositions of Law and Authorities Relied on in Support of Motion to Dismiss, as contained in the record filed in this court in No. 7228.

16. Order of Mr. Justice Peyton Gordon of June 30, 1938, denying Motion to Dismiss, as contained in the record filed in this Court in No. 7228.

17. Order of United States Court of Appeals for the District of Columbia of July 27, 1938, granting Special Appeal.

18. This Court's Opinion in Frank R. McNinch et al., v. Paul R Heitmeyer, No. 7228, rendered April 3, 1939.

144 19. This Court's judgment in the same case, filed April 3, 1939.

20. Petition for Rehearing filed April 20, 1939, by McNinch et al. Appellants in said case.

21. Opposition filed April 25, 1939, by Paul R. Heitmeyer to Petition for Rehearing.

22. Petition for Writ of Mandamus filed May 3, 1939, by Paul R. Heitmeyer.

23. Opposition of Federal Communications Commission filed May 8, 1939, to Petition of Paul R. Heitmeyer for Writ of Mandamus.

24. Minute Entry of this Court evidencing its action of May 23, 1939, denying Petition for Rehearing.

25. Order of this Court dated May 24, 1939, upon consideration of the Petition for Writ of Mandamus and Answer of respondents, ordering that a Writ of Mandamus issue.

26. Order of this Court entered May 25, 1939, that "the entries respecting the petition of Paul R. Heitmeyer for a Writ of Mandamus filed on May 3, 1939, and docketed by the Clerk on the general docket in case No. 7228 and the Opposition thereto filed by the Commissioners of the Federal Communications Commission on May 8, 1939, be transferred and the papers docketed by the Clerk on the original docket of the Court; * * *"

27. Minute entry of this Court of May 25 or May 26, evidencing its action staying issuance of Writ of Mandamus for 30 days.

28. Petition of June 9, 1939, by Frank R. McNinch et al., Respondents, to vacate the Order of this Court of May 24, 1939.

29. Opposition filed June 19, 1939, by Paul R. Heitmeyer to Petition of Respondents to Vacate Order.

30. Order of this Court of June 20, 1939, suspending its Order of May 24, 1939, for a period of 10 days, with leave to the Commission, within 5 days, to file in this Court its grounds of opposition.

145 31. Opposition of June 26, 1939, of Respondents to Petition for Writ of Mandamus.

32. Motion of respondents, filed July 6, 1939, for Leave to Appear and be Heard.

33. Petition of respondents, filed July 6, 1939, to Vacate or Further Suspend Order of this Court of May 24, 1939.

34. Opposition filed July 11, 1939, by Paul R. Heitmeyer to Petition of respondents to Vacate or Further Suspend Order.

35. Order of this Court of July 12, 1939, denying respondents' Petitions to Annul Order of May 24, 1939, or in lieu thereof Further

to Suspend the Same pending Oral Argument, and for Oral Argument.

36. This designation.

GOLDEN W. BELL,
Golden W. Bell,
Acting Solicitor General.

Service of copy of Designation of Record acknowledged this 7th day of August, 1939.

JAMES W. GUM,
Counsel for Paul R. Heitmeyer.

146 [Clerk's Certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed October 16, 1939

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is assigned for argument immediately following No. 265.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 24 1939
CHARLES ELMORE CROPLEY
CLERK

No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANK R. MCNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Page
Opinion below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	8
Reasons for granting the writ	10
Conclusion	11

CITATIONS

Cases:

Louis v. *Brown Township*, 109 U. S. 162	11
Nalle v. *Oyster*, 230 U. S. 165	11
The Pottsville Broadcasting Company v. *Federal Communications Commission; Schuylkill Broadcasting Company, Intervener*, decided April 3, 1939, No. 265, this Term	6, 10

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 316

FRANK R. MCNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the above petitioners, constituting the Federal Communications Commission, prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia entered on May 24 1939, commanding the Commission to set aside its order designating Heitmeyer's application for hearing on a comparative basis with other applications and directing the Commission to hear and reconsider the application on the basis of the record as originally made.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia has not yet been reorted (R. 52).

JURISDICTION

The order of the United States Court of Appeals sought to be reviewed was entered on May 24, 1939 (R. 70); and a petition to vacate an order granting a writ of mandamus and a motion for leave to appear and be heard were denied July 12, 1939 (R. 90). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

The Commission denied respondent's application for a construction permit for a radio broadcast station on the sole ground that it was not financially responsible. The court below reversed and remanded with instructions to proceed in accordance with its opinion. The Commission set the remanded cause for further hearing in consolidation with a hearing de novo on two other applications. The question is whether the court below has power to issue a writ of mandamus to compel the

[1] If the petition is granted, a second question will be urged in the argument on the merits. This question is whether the court, after its order denying respondent's motion for an order directing a hearing on the original record and on a noncomparative basis, had power in a subsequent and independent proceeding between the same parties to grant the same relief through issuance of a writ of mandamus.

Commission to reconsider petitioner's application on the original record and without regard to the subsequent applications.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, are printed in the Appendix to the petition in *Federal Communications Commission* v. *The Pottsville Broadcasting Co.*, No. 265, this Term.

STATEMENT

On March 25, 1935, Paul R. Heitmeyer filed an application with the Federal Communications Commission for a construction permit to erect a new radio broadcast station in Cheyenne, Wyoming (R. 1, 42). The Commission on July 30, 1935, designated this application for hearing together with the application of the Wyoming Radio Educational Association, which desired a permit to construct a similar station in the same city (R. 42). Hearing was held on October 30, 1935, before an examiner, who recommended in his report that Heitmeyer's application be granted (R. 43). Upon consideration by the Commission, however, Heitmeyer's application was denied on May 1, 1936, upon the sole ground of failure to establish the requisite financial qualifications (R. 3–6). On June 29, 1936, Heitmeyer appealed under Section 402 (b) of the Communications Act of 1934 to the United States Court of Appeals for the District of Co-

lumbia, from the Commission's order denying his application for a construction permit. The court reversed the Commission's decision and remanded the case on December 27, 1937, with instructions to proceed with the application in conformity with its opinion (R. 14). The opinion recited that "This does not mean that it is directed to issue a permit to the appellant. It is not the function of this Court to revise the action of the Commission from an administrative standpoint and to make an administrative judgment * * * the Commission in its further action is to respect and follow the * * * determination of the questions of law by this Court" (R. 13).

On January 15, 1938, Heitmeyer petitioned the Court of Appeals for an order which would stay the Federal Communications Commission, pending final decision of the cause, from granting a construction permit or license that would prevent or seriously interfere with the granting of petitioner's application. He pointed out that while the case was pending in that court another application for a station in Cheyenne had been filed by the Frontier Broadcasting Company; that a second applicant, the Cheyenne Radio Corporation, had filed an application requesting the same facilities requested by Heitmeyer, and that the granting of either of the two other applications would seriously prejudice his rights (R. 14–16). The court, on January 20, 1938, ordered that the Commission stay all further proceedings relating to the granting of a per-

mit for a broadcasting station at Cheyenne, Wyoming, until such time as final determination could be had of Heitmeyer's application (R. 16).

The Commission, on March 3, 1938, moved to vacate the stay of January 20, 1938, on the ground that it was its duty under the statute to hear the related applications on a comparative basis (R. 17–19). Heitmeyer on March 7, 1938, filed a motion to deny the petition which urged that he was entitled to a prior, noncomparative consideration on the record as originally made before his appeal to the court (R. 20–25). The Court of Appeals, on March 17, 1938, granted the Commission's motion to vacate the stay of January 20, 1938 (R. 29). Thereupon, the Commission on April 20, 1938, directed that the record in the case be reopened for further hearing before an examiner, consolidated with a hearing *de novo* which was ordered upon the applications of the Frontier Broadcasting Company and the Cheyenne Radio Corporation [2] (R. 35, 36).

Heitmeyer, on April 27, 1938, filed a motion in the court below, praying that the court issue a rule upon the Commission to show cause why it had not complied with the judgment of the court in reversing the Commission's action; he contended that the Commission had no power to take any action other than to reconsider the record as originally made (R. 30–33). Opposition to this motion was filed by the Commission on April 30, 1938 (R. 33).

[2] This latter application has been dismissed and is no longer involved in these proceedings.

The court on May 12, 1938, denied Heitmeyer's motion for the rule (R. 38). On May 23, 1938, the court denied Heitmeyer's motion (R. 39) to stay the effective date of the denial of his motion for rule to show cause, so that he could apply for certiorari to this Court (R. 40).

Heitmeyer then filed a bill of complaint in the United States District Court for the District of Columbia on June 1, 1938, praying that the Commission be permanently enjoined from granting any construction permit to any other applicant for a radio station at Cheyenne until after the Commission had rendered a decision on the record as made at the original hearing on Heitmeyer's application (R. 40–50). The Commission moved to dismiss on June 7, 1938 (R. 50). The motion was denied June 30, 1938 (R. 51). On April 3, 1939, the Court of Appeals, on a special appeal, held that the lower court was without jurisdiction and reversed and remanded the case with instructions to dismiss the bill, without prejudice to the application of Heitmeyer to the Court of Appeals for a writ of mandamus. The opinion pointed out that the court's decision in the *Pottsville* case was controlling and that Heitmeyer should have applied to the Court of Appeals for a writ of mandamus[1] (R. 52–54). Pe-

[1] *The Pottsville Broadcasting Company, appellant,* v. *Federal Communications Commission, appellee; Schuylkill Broadcasting Company, intervener,* decided April 3, 1939, not yet reported. A petition for writ of certiorari has been filed in this case, No. 265, this Term.

tition for rehearing was filed by the Commission on April 20, 1939, requesting the court to delete the language from the court's opinion which stated that Heitmeyer was entitled to apply for a writ of mandamus; this was on the ground that Heitmeyer had previously by a motion for rule to show cause sought this remedy unsuccessfully, and the matter was therefore res adjudicata (R. 55–64). Heitmeyer filed an opposition to the Commission's petition for rehearing on April 25, 1939 (R. 64).

While the petition for rehearing was pending, Heitmeyer in the appeal from the District Court, filed a petition for mandamus on May 3, 1939 (R. 66). The Commission filed an opposition on May 8, 1939, simply pointing out that the petition for mandamus was filed in the wrong case (R. 68–69). The court denied the Commission's petition for rehearing on May 23, 1939, and issued an order directing the issuance of a writ of mandamus on May 24, 1939 (R. 70). On May 25, 1939, the court directed that the entries respecting the petition for writ of mandamus be transferred from the docket pertaining to the appeal from the District Court to the original docket (R. 71). On the same day, May 25, 1939, the court below stayed the issuance of the writ for thirty days (R. 71). The Commission on June 9, 1939, filed a petition to vacate the court's order of May 24, 1939, stating that the order had been entered without the Commission's having been given an opportunity to file briefs or to appear and be heard (R. 72–74). On June 19, 1939, Heit-

meyer filed his opposition to the Commission's petition to vacate the order (R. 74). The court suspended its order on June 20, 1939, for a period of ten days, with leave to the Commission within five days to file its grounds of opposition and with leave to Heitmeyer to file an answer thereto within the succeeding five days (R. 76). The Commission filed its opposition on June 26, 1939 (R. 76). The Commission filed another petition, on July 6, 1939, to vacate or further suspend the order and also a motion for leave to appear and be heard (R. 85, 87); Heitmeyer filed an opposition on July 11, 1939 (R. 89). The court on July 12, 1939, entered an order denying the Commission's petition and motion and directing that the original order of mandamus issued on May 24, 1939, continue in full force and effect (R. 90).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In issuing a writ of mandamus to control the purely administrative functions of the Commission;

3. In assuming that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below in this case;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications for related matters;

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In assuming that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order of April 20, 1938, which designated Heitmeyer's application for hearing in consolidation

with the application of Frontier Broadcasting Company;

10. In commanding the Commission to hear and reconsider Heitmeyer's application on the basis of the record as originally made;

11. In readjudicating an issue previously determined and therefore res adjudicata.

REASONS FOR GRANTING THE WRIT

The principal issue in the instant case is substantially similar to the issue in *Federal Communications Commission* v. *Pottsville Broadcasting Company,* in which a petition for certiorari was filed with this Court on August 5, 1939, No. 265, this Term. The reasons for granting the writ set forth in the petition in that case apply with equal force here.[4]

---

[4] If the petition is granted, we shall urge another ground in the argument on the merits for the conclusion that the court below had no power to order the issuance of a writ of mandamus to compel the Commission to consider Heitmeyer's application on the original record and on a non-comparative basis. Heitmeyer had sought the same relief in his petition of January 12, 1938. The court below, on the Commission's motion and over Heitmeyer's objection, vacated the order giving Heitmeyer an interim stay on March 17, 1938, and on May 12, 1938, denied Heitmeyer's motion for a rule to show cause why the same relief should not be granted (*supra*, pp. 5–6). The writ of mandamus was issued in a subsequent proceeding between the same parties, presenting the same issues. It should, therefore, have been denied on the ground that the controversy was *res adjudicata*, a principle which governs mandamus proceed-

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

NEWMAN A. TOWNSEND,
Acting Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

August 1939.

---

ings as well as other actions. See *Louis* v. *Brown Township*, 109 U. S. 162, 166; *Nalle* v. *Oyster*, 230 U. S. 165, 180–182.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

Supreme Court, U.S.
FILED
DEC 22 1939
CHARLES ELMORE CROPLEY
CLERK

No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	8
Summary of argument	9
Argument:	
I. The court below had no authority or occasion by writ of mandamus to control the proceedings before the Commission subsequent to its reversal on a question of law	10
II. The question was res adjudicata	11
Conclusion	13

CITATIONS

Cases:	
Baker v. *Cummings*, 181 U. S. 117	13
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316	13
Cromwell v. *County of Sac*, 94 U. S. 351	13
Fayerweather v. *Ritch*, 195 U. S. 276	13
Louis v. *Brown Township*, 109 U. S. 162	11
Nalle v. *Oyster*, 230 U. S. 165	11, 13
North Carolina R. R. v. *Story*, 268 U. S. 288	13
Oklahoma v. *Texas*, 256 U. S. 70	13
Pottsville Broadcasting Company v. *Federal Communications Commission*, 105 F. (2d) 37, No. 265, this Term	6, 9, 10
Southern Pacific Railroad v. *United States*, 168 U. S. 1	13
United Shoe Machinery Co. v. *United States*, 258 U. S. 451	13
Virginia-Carolina Chemical Co. v. *Kirven*, 215 U. S. 252	13
Miscellaneous:	
Rule 106.46 of Rules of Practice and Procedure of the Federal Communications Commission	8

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 316

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 52) is reported in 105 F. (2d) 41.

JURISDICTION

The order of the United States Court of Appeals was entered on May 24, 1939 (R. 70), and a petition to vacate an order granting a writ of mandamus and a motion for leave to appear and be heard were denied July 12, 1939 (R. 90). The petition for a writ of certiorari was filed August 24, 1939, and granted on Oc-

tober 16, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The Commission denied respondent's application for a construction permit for a radiobroadcast station on the sole ground that it was not financially responsible. The court below reversed and remanded with instructions to proceed in accordance with its opinion. The Commission set the remanded cause for further hearing in consolidation with a hearing on two other applications. The question is whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider respondent's application on the original record and without regard to the subsequent applications.

2. Whether the court below, after an order denying respondent's motion for a rule to show cause why a hearing should not be held on the original record and on a noncomparative basis, had the power in a subsequent and independent proceeding between the same parties to grant the same relief through the issuance of a writ of mandamus.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934 are printed in the Appendix to the brief for the petitioner in *Federal Communications Commission* v. *The Pottsville Broadcasting Company*, No. 265, this Term.

STATEMENT

On March 25, 1935, Paul R. Heitmeyer filed an application with the Federal Communications Commission for a construction permit to erect a new radio broadcast station in Cheyenne, Wyoming. (R. 1, 42.) The Commission designated this application for hearing, together with the application of the Wyoming Radio Educational Association, which desired a permit to construct a similar station in the same city. Hearing was held on October 30, 1935, before an examiner who recommended in his report that Heitmeyer's application be granted. (R. 42–43.) Upon consideration by the Commission, however, Heitmeyer's application was denied on May 1, 1936, upon the sole ground of failure to establish the requisite financial qualifications. (R. 3–6.) On June 29, 1936, Heitmeyer appealed under Section 402 (b) of the Communications Act of 1934 to the United States Court of Appeals for the District of Columbia from the Commission's order denying his application for a construction permit. The court reversed the Commission's decision and remanded the case on December 27, 1937. (R. 14.) The opinion recited that "This does not mean that it is directed to issue a permit to the appellant. It is not the function of this court 'to revise the action of the Commission from an administrative standpoint and to make an administrative judgment * * * the Commission in its further action is to respect and follow the * * * determination of the questions of law' by this court." (R. 13.)

On January 15, 1938, Heitmeyer petitioned the Court of Appeals for an order which would stay the Federal Communications Commission, pending final decision of the cause, from granting a construction permit or license that would prevent or seriously interfere with the granting of petitioner's application. He pointed out that while the case was pending in that court another application for a station in Cheyenne had been filed by the Frontier Broadcasting Company; that a third applicant, the Cheyenne Radio Corporation, had filed an application requesting the same facilities requested by Heitmeyer, and that the granting of either of the two other applications would seriously prejudice his rights. (R. 14–16.) The court, on January 20, 1938, ordered that the Commission stay all further proceedings relating to the granting of a permit for a broadcasting station at Cheyenne, Wyoming, until such time as final determination could be had of Heitmeyer's application. (R. 16.)

The Commission, on March 3, 1938, moved to vacate the stay of January 20, 1938, on the ground that it was its duty under the statute to hear the related applications on a comparative basis. (R. 17–19.) Heitmeyer on March 7, 1938, filed a motion to deny the petition which urged that he was entitled to a prior, noncomparative consideration on the record as originally made before his appeal to the court. (R. 20–25.) The Court of Appeals, on March 17, 1938, granted the Commission's motion to vacate the stay of January 20, 1938. (R. 29.) Thereupon, the Commission on April 20, 1938,

directed that the record in the case be reopened for further hearing before an examiner, consolidated with a hearing *de novo* which was ordered upon the applications of the Frontier Broadcasting Company and the Cheyenne Radio Corporation.[1] (R. 35, 36.)

Heitmeyer, on April 27, 1938, filed a motion in the court below, praying that the court issue a rule upon the Commission to show cause why it had not complied with the judgment of the court in reversing the Commission's action; he contended that the Commission had no power to take any action other than to reconsider the record as originally made (R. 30–33). Opposition to this motion was filed by the Commission on April 30, 1938 (R. 33). The court on May 12, 1938, denied Heitmeyer's motion for the rule (R. 38). On May 23, 1938, the court denied Heitmeyer's motion (R. 39) to stay the effective date of the denial of his motion for rule to show cause, so that he could apply for certiorari to this Court (R. 40).

Heitmeyer then filed a bill of complaint in the United States District Court for the District of Columbia on May 31, 1938, praying that the Commission be permanently enjoined from granting any construction permit to any other applicant for a radio station at Cheyenne until after the Commission had rendered a decision on the record as made at the original hearing on Heitmeyer's application. (R. 40–50.) The Commission moved to dismiss on June 7, 1938. (R. 50.) The motion

[1] This latter application has been dismissed and is no longer involved in these proceedings.

was denied June 30, 1938. (R. 51.) On April 3, 1939, the Court of Appeals, on a special appeal, held that the lower court was without jurisdiction and reversed and remanded the case with instructions to dismiss the bill, without prejudice to the application of Heitmeyer to the Court of Appeals for a writ of mandamus. The opinion pointed out that the court's decision in the *Pottsville* case was controlling and that Heitmeyer should have applied to the Court of Appeals for a writ of mandamus.[2] (R. 52–54.) Petition for rehearing was filed by the Commission on April 20, 1939, requesting the court to delete the language from the court's opinion which stated that Heitmeyer was entitled to apply for a writ of mandamus; this was on the ground that Heitmeyer had previously by a motion for rule to show cause sought this remedy unsuccessfully, and the matter was therefore *res adjudicata*. (R. 55–64.) Heitmeyer filed an opposition to the Commission's petition for a rehearing on April 25, 1939. (R. 64.)

While the petition for rehearing was pending, Heitmeyer in the appeal from the District Court, filed a petition for mandamus on May 3, 1939. (R. 66.) The Commission filed an opposition on May 8, 1939, simply pointing out that the petition for mandamus was filed in the wrong case. (R. 68–69.) The court denied the Commission's petition for rehearing on May 23, 1939, and issued an order directing the issuance of a writ of mandamus on May 24, 1939. (R. 70.) On May

[2] *Pottsville Broadcasting Company* v. *Federal Communications Commission*, 105 F. (2d) 37, pending on writ of certiorari, No. 265, this Term.

25, 1939, on its own motion and without notice to the parties, the court directed that the entries respecting the petition for writ of mandamus be transferred from the docket pertaining to the appeal from the District Court to the original docket. (R. 71.) On the same day, May 25, 1939, the court below stayed the issuance of the writ for thirty days. (R. 71.) The Commission on June 9, 1939, filed a petition to vacate the court's order of May 24, 1939, stating that the order had been entered without the Commission's having been given an opportunity to file briefs or to appear and be heard. (R. 72–74.) On June 19, 1939, Heitmeyer filed his opposition to the Commission's petition to vacate the order. (R. 74.) The court suspended its order on June 20, 1939, for a period of ten days, with leave to the Commission within five days to file its grounds of opposition and with leave to Heitmeyer to file an answer thereto within the succeeding five days. (R. 76.) The Commission filed its opposition on June 26, 1939. (R. 76.) The Commission filed another petition, on July 6, 1939, to vacate or further suspend the order and also a motion for leave to appear and be heard (R. 85, 87); Heitmeyer filed an opposition on July 11, 1939. (R. 89.) The court on July 12, 1939, entered an order denying the Commission's petition and motion and directing that the original order of mandamus issued on May 24, 1939, continue in full force and effect. (R. 90.)

This Court granted the petition for a writ of certiorari on October 16, 1939, and on November 13, 1939, substituted J. Lawrence Fly as party petitioner in the place of Frank R. McNinch, resigned.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In issuing a writ of mandamus to control the purely administrative functions of the Commission;

3. In assuming that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below in this case;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications for related matters;

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In assuming that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order of April 20, 1938, which designated Heitmeyer's application for hearing in consolidation with the application of Frontier Broadcasting Company;

10. In commanding the Commission to hear and reconsider Heitmeyer's application on the basis of the record as originally made;

11. In readjudicating an issue previously determined and therefore *res adjudicata.*

SUMMARY OF ARGUMENT

I

For the reasons stated in the brief for the petitioner in *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* No. 265, this Term, the court below had no authority or occasion by writ of mandamus to control the proceedings before the Commission subsequent to its reversal on a question of law.

II

The court below had before, in independent proceedings, determined against the respondent the same issue as that now presented. Its decision was, therefore, *res adjudicata* of the petition for a writ of mandamus.

ARGUMENT

I

THE COURT BELOW HAD NO AUTHORITY OR OCCASION BY WRIT OF MANDAMUS TO CONTROL THE PROCEEDINGS BEFORE THE COMMISSION SUBSEQUENT TO ITS REVERSAL ON A QUESTION OF LAW

1. Our argument on this score is presented in the brief for the petitioner in *Federal Communications Commission v. Pottsville Broadcasting Co.*, No. 265, this Term, to which the Court is respectfully referred.

2. There are, however, two circumstances in this case which differ from the facts presented in No. 265.

The Commission, in denying the respondent's application because he had failed to show financial responsibility, did not make affirmative findings as to issues upon which its judgment would have been favorable to the respondent, except to decide that he is a citizen and is technically qualified (R. 4; see R. 5). In the *Pottsville* case, on the other hand, the Commission had found need for a local station in Pottsville and sufficient financial patronage and local talent (see brief for petitioner in No. 265, pp. 24, 45).

In the present case, the Commission directed that the record be opened for further hearing before an examiner, and consolidated with a hearing *de novo* which was ordered upon the two pending conflicting applications (R. 35). This action was taken on April 20, 1938, and may well have been indicated by the fact that it had been two and one-half years since the original hearing on October 30, 1935, with respect to respondent's application (R. 42). In the *Pottsville* case, on the other hand, the

Commission merely set the application for oral argument before the Commission on the same day that argument was to be heard on the conflicting applications, as to which the hearings had already been completed.

Neither of these two variations seems in any way to be material to the argument presented by the petitioner in No. 265 and adopted herein.

II

THE QUESTION WAS *RES ADJUDICATA*

The court below, in an independent proceeding in which respondent requested the same relief from the same order of the Commission, denied respondent the relief which it has now granted in this proceeding. Since the principles of *res adjudicata* govern mandamus proceedings as fully as other proceedings, *Louis* v. *Brown Township*, 109 U. S. 162, 166; *Nalle* v. *Oyster*, 230 U. S. 165, 180–182, respondent's petition for a writ of mandamus should have been denied.

The general question was initially presented to the court below by a motion to vacate a stay order entered in connection with respondent's appeal. The court below granted this motion and vacated (R. 29) an order which had been entered, after the reversal on the appeal, staying the Commission from any further proceedings with relation to a station license at Cheyenne, Wyoming, until final action was had on respondent's application (R. 16–17). The petition for the stay (R. 14), the motion to vacate it (R. 17), respondent's opposition to this motion (R. 20–25), and the reply of the Commission (R. 25–29) each shows that the issue then before the court was whether the Commission should consider all the

pending applications upon a comparative basis or whether respondent's application should first be considered alone. Subsequently, on April 20, 1938, the Commission entered the order which is complained of in the instant proceeding (R. 35). Respondent then moved the court below for a rule to show cause why the Commission should not act upon his application on the basis of the record made prior to his appeal without regard to the pendency of conflicting applications. The issues (involving the same order of the Commission as is involved in this case), as shown by the motion (R. 30–33) and the Commission's opposition (R. 34–36), were also the same as those presented in the instant mandamus proceeding. The court below denied respondent's motion for the rule and also denied a request by respondent for a stay pending review by this Court (R. 38, 39). No further proceedings were had in that case.

The writ of mandamus was issued in an independent proceeding. It was instituted by a bill for injunction in the District Court (R. 40–50), which the court below ordered dismissed (R. 54). Subsequently in that proceeding, respondent filed with the court below a petition for a writ of mandamus (R. 66), which the court granted (R. 70) and, the following day, ordered transferred to the original docket (R. 71).

The petition for rehearing filed by the Commission pointed out that the issues were *res adjudicata* (R. 60–63); this ground had not been raised earlier because the Commission considered it sufficient in opposition to the petition for a writ of mandamus to point out that it had been filed in the wrong proceeding (R. 68–69).

Settled principles of *res adjudicata* show that the court could not in a subsequent action between the same parties undertake to reexamine the same issues or to grant relief the same in substance as that which it had earlier denied. See *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48–52; *Baker* v. *Cummings*, 181 U. S. 117; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300–301; *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252; *Nalle* v. *Oyster*, 230 U. S. 165, 181; *Oklahoma* v. *Texas*, 256 U. S. 70; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 458–459; *North Carolina R. R.* v. *Story*, 268 U. S. 288; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order and judgment of the court below should be reversed, with instructions to dismiss respondent's petition for a writ of mandamus.

ROBERT H. JACKSON,
Solicitor General.

WARNER W. GARDNER,
ROBERT M. COOPER,
Special Assistants to the Attorney General.

MARGARET H. BRASS,
Special Attorney.

WILLIAM J. DEMPSEY,
General Counsel.

WILLIAM C. KOPLOVITZ,
Assistant General Counsel.
Federal Communications Commission.

DECEMBER 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

SEP 23 1939

No. 316

In the Supreme Court of the United States

OCTOBER TERM 1939

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CLARENCE C. DILL,
JAMES W. GUM,
815 15th Street, N.W.
Washington, D. C.
Attorneys for Respondent.

INDEX

	Page
Preliminary Statement	1
The Question	4
Conclusion	6

CITATIONS

CASES:

Ex parte Mansfield, 11 App. D. C. 558 (1897); 25 W. L. R. 783 5

Federal Communications Commission v. Pottsville Broadcasting Company 4-5

Hartman v. Masters, 46 App. D. C. 271 (1917); 45 W. L. R. 246 5

In re Macfarland, 30 App. D. C. 365 (1908); 36 W. L. R. 114, dismissed 215 U. S. 614 5

Mulvihill v. Clabaugh, 21 App. D. C. 440 (1903); 31 W. L. R. 210 5

Slater v. Willige, 16 App. D. C. 364 (1900); 28 W. L. R. 454 5

U. S. ex rel Beall v. Cox, 14 App. D. C. 368 (1899); 27 W. L. R. 231 5

U. S. ex rel Holmead v. Barnard, 29 App. D. C. 431 (1907); 35 W. L. R. 370 5

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 316

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PRELIMINARY STATEMENT

On May 1, 1936 (R. 2), the Federal Communications Commission denied an application of the above-named respondent, Paul R. Heitmeyer, for authority to construct and operate a new local radio broadcast station at Cheyenne, Wyoming.

On December 27, 1937, the United States Court of Appeals for the District of Columbia, reversed and remanded that denial of the Federal Communications Commission. No plea for reconsideration of that judgment was ever made, although the rules of Court provide therefor.

Following that order (R. 30, 35, 36), the Commission proceeded to nullify and set aside the judgment of said United States Court of Appeals through the vehicle of a further hearing *and consolidation* thereof with a hearing *de novo* on two new applications. These two new applications had been filed while Heitmeyer's appeal was pending in the United States Court of Appeals for the District of Columbia. In other words, the Commission proceeded to take steps to make an entirely new record, with new parties and new issues. The Commission did this too, without the consent, knowledge or permission of the Appellate Court.

Thus, the Commission refused to proceed to make new findings of fact and a new decision on the record upon which Heitmeyer had appealed and upon which the Appellate Court had acted. If Heitmeyer had permitted the Commission to hold this new comparative and consolidated hearing on his own application and the other two new applications, both of which were filed after he had taken his appeal, he, himself would have made worthless all of his original record. He would thereby have nullified the winning of his own appeal to the United States Court of Appeals for the District of Columbia. To have permitted this hearing and to have participated in it would have forced him to make an entirely new

record. He would have been compelled to make a new showing of all facts necessary to be shown in a hearing on the application in comparison with these two new parties thereto, hitherto strangers to this case.

To prevent this prostitution of justice, and to compel the Commission to follow the age-old rule of all courts and cases, namely, the right to have a corrected decision on the record used on appeal, Heitmeyer took the procedural steps as outlined in the record. Those procedural steps resulted in a second decision and judgment (R. 52) by the United States Court of Appeals for the District of Columbia. This second opinion was of the same tenor as the first; except that it left no possible doubt of that Court's intent. The opinion was clear and positive as to the duty of the Commission to correct the wrong decision it had made on the record in the case, and to do this without any regard to new parties who might have filed applications long after the Heitmeyer record was closed and he had taken his appeal from the Commission's wrong decision.

The Commission has never made any effort to comply with the said judgments, nor has the Commission ever made any attempt to justify its refusal to comply with those judgments. Instead, it has delayed taking such action by every possible legal method. With each new delay, the Commission has insisted a new record should be made because of the lapse of time since the original record was made, although it has never applied to the Appellate Court for permission to reopen the case and take further testimony. This is especially significant when we recall that the Appellate Court pointed out

to the Commission the means of and grounds for reopening the record for further proceedings (R. 53).

Having considered all these facts, the Appellate Court on May 24, 1939 (R. 70), on petition, ordered that a writ of mandamus issue. In other words, the Court, after the lapse of one year and five months, issued mandamus to force compliance with its judgment.

Now, the Commission, through the Solicitor General, asks that this Court consider setting aside the order directing that mandamus issue, but at the same time, gives absolutely no reason why it should not comply with the Court's order of December 27, 1937.

THE QUESTION

The question now, and the sole question, is whether or not the Court below has power to issue a writ of mandamus to compel the Federal Communications Commission to comply with and carry out the Court's judgment of December 27, 1937.

Section 230, Page 70 of the Annotated Code of Laws for the District of Columbia, as amended to June 7, 1924, provides:

> "The said Court of Appeals shall have power to issue all necessary and proper remedial *prerogative* writs in aid of its appellate jurisdiction."

Section 402 (e) of the Communications Act of 1934, as amended and as quoted at Page 25 of the petition for certiorari in *Federal Communications Commission* vs. Pottsville

Broadcasting Company, in which a petition for certiorari was filed with this Court on August 5, 1939, No. 265, this term, specifically provides that the judgment of the United States Court of Appeals in these matters shall be final, subject only to review by this Court, as follows:

> "* * * The Court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 240 of the Judicial Code, amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

The judgment of December 27, 1937 here involved, has become final. In fact, no request has ever been made to modify, correct, enlarge or change that judgment in any way. The Court below, clearly therefore, has power to mandamus the Commission to act in accordance with that judgment as in aid of its appellate jurisdiction.

Mulvihill v. Clabaugh, 21 App. 440 (1903); 31 W.L.R. 210;

Slater v. Willige, 16 App. D.C. 364 (1900); 28 W.L.R. 454;

U. S. ex rel Beall v. Cox, 14 App. D. C. 368 (1899); 27 W.L.R. 231;

U. S. ex rel Holmead v. Barnard, 29 App. D. C. 431 (1907); 35 W.L.R. 370;

In re Macfarland, 30 App. D.C. 365 (1908); 36 W. L. R. 114, dismissed 215 U.S. 614;

Ex parte Mansfield, 11 App. D.C. 558 (1897); 25 W. L.R. 783;

Hartman v. Masters, 46 App. D.C. 271 (1917); 45 W.L.R. 246.

CONCLUSION

In view of the foregoing, respondent submits that the petition for certiorari should be denied.

PAUL R. HEITMEYER

BY .....

CLARENCE C. DILL,
JAMES W. GUM,
815 15th Street, N.W.
Washington, D. C.
Attorneys for Respondent.

September 1939.

FILED
JAN 8 1940
CLERK

No. 316.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN AND PAUL A. WALKER, *Petitioners.*

v.

PAUL R. HEITMEYER.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

CLARENCE C. DILL,
JAMES W. GUM,
Counsel for Paul R. Heitmeyer.

January, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion of Court Below	1
Question Presented	2
Statement	2
Arguments of Appellants	3
Confusing the Issue	8
Argument	9
Appellants' Mistaken Premise	9
Grant of Power Not Mandatory Duty	12
Result of Commission's Plan of Procedure	13

CITATIONS.

CASES:

Chicago Federation of Labor v. *Federal Radio Commission*, 41 F. (2) 422	11
City National Bank v. *Hunter*, 152 U. S. 512	8
Federal Laboratories v. *Federal Radio Commission*, 36 F. (2) 111	10
Hinckley v. *Morton*, 103 U. S. 764	8
Mason v. *Peewabic Min. Co.*, 153 U. S. 361	8
Morgan v. *United States*, 304 U. S. 1	5
Nashua & L. R. Corp. v. *Boston & L. R. Corp.*, 5 U. S. App. 97, 51 Fed. Rep. 929	8
Perkins v. *Forniquet*, 55 U. S. 14 How. 313	8
Radio Commission v. *Nelson Bros.*, 289 U. S. 266	10
Re Washington & S. R. Co., 140 U. S. 91	8
Salzman v. *Stromberg Carlson Co.*, 46 F. (2) 612	12
Sanford Fork & Tool Co., Petitioner, 160 U. S. 247	6
Sibald v. *United States*, 37 U. S. 12 Pet. 488	8
Texas & P. R. Co. v. *Anderson*, 149 U. S. 237	8

No. 316.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN AND PAUL A. WALKER, *Petitioners.*

v.

PAUL R. HEITMEYER.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

OPINION OF COURT BELOW.

The United States Court of Appeals for the District of Columbia rendered its opinion April 3, 1939 (R. 52), which is reported in 105 F. (2) 41.

The Commission failed to carry out the opinion and order of the Court within the 30 day period prescribed by the Court, whereupon Paul R. Heitmeyer, the respondent

herein, petitioned the Court for a writ of mandamus (R. 66.) The appellant filed its Opposition to said petition on May 8, 1939 (R. 68), and on May 24, 1939 the Court filed its Per Curiam Order granting the writ of mandamus (R. 70.)

Following refusal of the Court below to vacate said order, Federal Communications Commission petitioned for a writ of certiorari on August 24, 1939, which was granted October 16, 1939.

QUESTION PRESENTED.

While the technical question presented is whether or not the Court below erred in issuing the order for the writ of mandamus, the substance of the issue goes to the main question of the right of the Commission to reopen the hearings in this case and bring in two new parties, hitherto strangers and unknown to the record, for a comparative hearing of their application with the application of respondent, their applications having been filed after the record in this case was closed and the appeal had been taken.

STATEMENT.

Both the appellant, in supporting, and the respondent, in opposing the writ of certiorari, reviewed the history of the case in their briefs, and appellant has repeated the historical statement again at great length in its brief on pp. 3 to 7, inclusive.

It seems unnecessary, therefore, to review all of the details as to dates and rulings in this case again in this brief. It is sufficient to call attention to the fact that the Court below reversed the decision of the Commission refusing Paul R. Heitmeyer a construction permit for a new radio station at Cheyenne, Wyoming, on December 27, 1937. That was more than two years ago. Ever since that time, the Commission has avoided making a new decision on the record in accordance with the decision of the United States Court of Appeals for the District of Columbia.

For nearly a year and a half respondent has tried first by one legal method and then by another, to induce or compel the Commission to make a decision on the record on which appellants secured a reversal of the Commission's decision. The Commission was able to avoid making any such decision or even facing the issuance of a direct order of the Court below to take such action until May 24, 1939, when respondent secured the writ of mandamus directing the Commission so to do, whereupon the Commission, still unwilling to carry out the Court's order, secured a writ of certiorari from this Court.

Just why the Commission has so steadfastly resisted making a decision on this record has never been made plain. In its erroneous decision, as the Court below pointed out, it refused to grant Heitmeyer's application because he proposed to build and begin operating the station on borrowed money (R. 10-13.) This was arbitrary and capricious.

While the Commission set aside its arbitrary decision, it has never corrected that decision. During all these years the people of Cheyenne, the capital of Wyoming, have been without any primary radio service or even good secondary radio service.

ARGUMENTS OF APPELLANTS.

Counsel for the Commission have written a rather lengthy brief in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, No. 265, covering many of the questions presented by this case. They have adopted (p. 10 of appellants' Heitmeyer brief) the argument in that brief as a part of the brief in this case.

Counsel for the Commission try to make it appear that the variations of the facts in the Heitmeyer case are not material to the argument presented in No. 265. (See pp. 10 and 11 of appellant's brief).

We respectfully call the Court's attention to the fact that there are a number of distinct differences in the two cases:

1. In the Heitmeyer case, the respondent is required to have a hearing *de novo* and that hearing is to be a comparative hearing with two new applications that were filed after respondent took his appeal to the Court below. No new hearing or new record is required in the Pottsville case. Such a hearing would make the record of respondent upon which he secured a reversal of the Commission's decision worthless and useless in the new case. The Commission thereby would never be required to make a correct decision on the record upon which it made an erroneous decision.

2. In the Pottsville brief, appellants declare (p. 17), that the other applications involved were pending when it decided the Pottsville case. In the Heitmeyer case, the Commission had not only rendered its decision previous to the filing of the other two applications mentioned, but Heitmeyer's appeal had been taken and was pending. The reasons therein given by appellants for comparative consideration, therefore, do not apply in the Heitmeyer case.

3. Appellant's brief in the Pottsville case (p. 19), declares also that it might be necessary to grant one of the other applications and, because of such grant, be necessary to modify a license to the respondent. In the Heitmeyer case no such condition exists. Cheyenne, Wyoming is too small a town to support more than one station, so that if one applicant is granted a license, the Commission would have no reason for granting another application so long as the first licensee made a proper use of the facilities granted.

4. Appellants argue in the Pottsville brief (p. 9), that the Court below was interfering with the administrative procedure of the Commission when it ordered a decision on the record. They cite the amendment to the Federal Radio Act of 1927, which prohibited the Court from revising the Commission's decisions.

Neither the Court's decision nor its order granting a writ of mandamus in any way attempted to revise the

Commission's decision. The Court reversed the Commission's decision as arbitrary and capricious and remanded the case for further action, in accordance with that opinion. As stated in appellants' Heitmeyer brief (p. 3), the Court specifically declared:

> "This does not mean that it is directed to issue a permit to the appellant. * * * 'The Commission in its further action is to respect and follow the * * * determination of the questions of law' by this Court." (R. 13).

That is all the order granting the writ of mandamus directs the Commission to do.

As stated by respondent in his brief to the Court below (see p. 5 of brief of Paul R. Heitmeyer attached hereto as an appendix and made a part of this brief):

> "We call attention again to the fact that the law specifically and clearly states in Sec. 402 (e) that this Court's judgment shall be 'FINAL.'
>
> "Final for what? A further hearing? The creation of a **new** record with **new** issues requiring a **new** decision? Surely the Commission must make a legally correct 'decision' **once** on a case nearly **four years** old."

This case is now nearly five years old.

Quoting further from the Brief of Heitmeyer (p. 5), appended hereto:

> "In the case of *Morgan* v. *United States*, the Supreme Court said:
>
> 'The requirements of **fairness** are not exhausted in the taking or consideration of evidence, **but** extend to the **concluding** parts of the procedure **as well as** to the beginning and intermediate steps.' (Emphasis ours) 304 U. S. 1, 20."

5. Appellants argue in their brief (p. 9 of appellants' Brief in Heitmeyer case), as before the Court below, that the Court had no authority or occasion by writ of manda-

mus to compel the Commission to carry out its decision and order.

Appellants again present their claim that the decision of the Court below was *res adjudicata.*

As stated in the Heitmeyer brief of appellants, opposing granting writ of certiorari, the decision of the Court below has become final and the Court therefore has power to mandamus the Commission to carry out its orders (see p. 5 of Brief in Opposition to Petition for Writ of Certiorari with accompanying citations of supporting cases.)

In this connection we call attention to the opinion of the Court below (R. 53), to whom this same claim of **res adjudicata** was made. The Court, in explaining why it denied the motion for a rule to show cause, said:

> "We reversed that decision (the Heitmeyer decision) and remanded the case with instructions to proceed with the application in conformity with our opinion. Our judgment imposed on the Commission the duty of rehearing the case on the original record. Sanford Fork and Tool Co., Petitioner, 160 U. S. 247, 255. This is peculiarly true because of the fact that that record, as we have seen, was made upon full hearing of all the issues relative to the applicant's right to a permit; and **it was because we understood that the Commission would so proceed that we denied the rule to show cause.** It was not then brought to our attention—or, if it was, we overlooked it—that the Commission intended to impose upon appellee the making of an entirely new record, and to make the decision turn upon the relative merits of the qualifications of himself and two new parties who had become applicants for identical facilities since his case was first heard and decided and who, under the Commission's own rules, were not eligible to become parties to the record on appellee's application." (Emphasis ours).

6. Counsel for appellants have labored at great length in the Pottsville brief (pp. 37 to 46), to show that the Federal Communications Commission is not subject to the or-

ders of the Court below to carry out the terms of the decision as a judicial Court would do. In this they have completely failed.

The Federal Communications Commission is no different in character from the numerous other quasi-judicial bodies called commissions, which the Congress has constituted. For nearly 50 years, the Interstate Commerce Commission has accepted the reversals of its decisions and carried out the orders of the courts that have overruled them. No commission, so far as counsel for respondent has been able to learn, has ever before attempted to set itself up as above and beyond the rule of the courts as to the right of an applicant for a governmental privilege to have a decision on the record made before the quasi-judicial body empowered to grant such privilege.

The language of the appeal section of the Radio Communications Act of 1934 is almost identical with the language of the appeal sections of the acts of Congress creating and governing other commissions. It has remained for counsel for appellants to invent the novel theory that the Communications Commission is an administrative body to be excepted from the requirement of the general rule of law, set forth by this Court in *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255, and specifically relied upon by the Court below (R. 53):

In that case, the Supreme Court, by Mr. Justice Gray, said:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibald* v. *United States*,

37 U. S. 12 Pet. 488, 492, (9:1167, 1169); *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237. (37:717).

"If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins* v. *Fourniquet*, (55 U. S. 14 How. 313, 330) (14:435, 442). *Re Washington & G. R. Co.* 140 U. S. 91 (35:339); *City National Bank* v. *Hunter*, 152 U. S. 512 (38:534), 153 U. S. 246 (38:705). But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley* v. *Morton*, 103 U. S. 764 (26:458); *Mason* v. *Pewabic Min. Co.* 153 U. S. 361 (38:754); *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 5 U. S. App. 97, 51 Fed. Rep. 929."

7. Appellants argue also that Heitmeyer would suffer no irreparable injury. As pointed out to the Court below (see p. 15 of Brief of Paul R. Heitmeyer, attached hereto as appendix and made a part of this brief), if he refused to appear and take part in the new hearing with two new applicants, he would be in default, and if he participated in the hearing, he must make a new record and this would necessarily destroy any further consideration of the record upon which he had appealed and won a reversal.

CONFUSING THE ISSUE.

In appellants' briefs, both in the Pottsville case, No. 265, and in the Heitmeyer case, No. 316, appellants have tried to confuse the simple, clear issue in these cases by repeating the statement again and again that what the Commission does in this case after setting aside its erroneous decision, is entirely procedural and beyond control of the Court.

The issue is this: Has an applicant for a radio station the right to have his application decided by the Federal Communications Commission on the record made in a full and complete hearing, after the United States Court of Appeals for the District of Columbia has reversed the Commission's erroneous decision?

or

Must such an applicant submit to a comparative hearing *de novo* with two other applicants, new and strange to the record, and thereby never secure a corrected decision on the record he made and upon which he appealed and won a reversal?

ARGUMENT.

Counsel for the appellant Commission argue at great length that the Court below has attempted to interfere with the procedural duties of the Commission. Using that conclusion as a basis, they would have this Court justify all the erroneous orders of the Commission in this case. They try to make it appear that the Court below is entirely without authority to enforce its own orders because, as they say, the Court's order is an interference with the procedural rights and duties of the Commission.

APPELLANTS' MISTAKEN PREMISE.

Almost the entire argument of the appellants, as set forth in both the Pottsville and Heitmeyer briefs, is based upon the premise that the Commission **must grant a license to the applicant who will best serve the city or community for which new facilities are to be granted,** regardless of existing grants or licenses. They specifically make that statement in their brief in the *Pottsville* case (Page 39) as follows:

> "The Commission must obey the statutory command that the application which **best** serves the public interest be granted." (Emphasis ours.)

There is no such statutory command. The statute, Sec. 309 (a) provides:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding."

Of course, the same requirement, namely, "that public interest, convenience or necessity will be served by the granting thereof", applies to the Commission in granting a license after a hearing exactly as without a hearing. But there is no language in the statute, which even by inference, can be cited to support the claim of counsel for the appellant Commission, that after granting one license, if some other applicant comes along and promises to render better service, the Commission **must** modify or even refuse to renew the license of the existing licensee.

Nor is there a direction by any Court decision to that effect. In fact, the Commission itself, as well as the Court, have decided repeatedly that where an applicant has been granted a station license and is making proper use of the facilities, the Commission will not refuse to renew the application of the existing station, even though some other applicant might promise to make a better use of the said facilities.

From the decisions on this subject and the general rule of equity as applied to rights of radio licensees, it is clear that a court of equity would not permit the Commission to take such action.

The Court of Appeals first promulgated that idea in *Federal Laboratories v. Federal Radio Commission*, 36 F. (2d) 111, in 1929. The Court there referred to the right of renewal as a "continuing right." The Court declared that the applicant in that case was securing not only a new li-

cense, but also the right to a renewal license if it had made proper use of the facilities granted.

Again, in the case of *Chicago Federation of Labor* v. *Federal Radio Commission*, 41 F. (2d) 422, decided in 1930, the Court of Appeals sustained the Radio Commission's decision in favor of the renewal rights of the licensee's using the facilities for which WCFL applied.

In that case, the Court said:

> "The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced if the licenses of established stations should arbitrarily be withdrawn from them and appropriated to the use of other stations."

Acting on this suggestion by the Court, the Commission has never granted the facilities of one licensee to a new applicant simply because he promised to render a better service than the existing licensee. The Commission has consistently decided that if the existing licensee is making a proper use of the facilities, its license should be renewed.

Counsel for the Commission cite the decision in the *WIBO* case, *Radio Commission* v. *Nelson Bros.*, 289 U. S. 266, to support their conclusion that the Commission **must** grant a license to the applicant who will **best** serve the area under consideration, regardless of the rights of existing licensees. This is an entirely wrong interpretation and use of that decision.

What this Court really decided in that case was that as between contesting applicants, when the Commission was carrying out the direction of Congress in a regulatory manner, the right of the existing station to a renewal of license was not such as to stand against the exercise of the Commission's duty as directed by Congress.

At no time has the Court of Appeals of the District of Columbia or this Court ever decided that an existing licensee's license **must** be modified or its renewal **must** be denied simply because another applicant might promise to render better service, if granted such facilities.

GRANT OF POWER NOT MANDATORY DUTY.

It is true, as counsel for appellant argue, that the law gives the Commission the power to modify an existing license or to refuse its renewal, but this cannot be done without giving the existing licensee a hearing. (See *Salzman* v. *Stromberg Carlson Co.*, 46 F. (2d) 612.) That is a far different state of affairs from the claim which counsel for the appellant Commission makes in the *Pottsville* and *Heitmeyer* cases now for the first time, namely, that this right of the Commission must be considered a mandatory duty.

In the instant case, the Court of Appeals does not attempt to interfere with the procedure of the Commission. Having reversed the Commission, it has simply ordered that body to proceed to correct its decision and base that decision on the record which it used when it made its first erroneous decision.

What has the Commission done? It has insisted upon a hearing *de novo* with two new applicants, applicants who did not file their application until long after the record in this case had been closed. Appellants repeatedly assert in their briefs that the changed conditions make further hearings necessary.

As stated in Heitmeyer's brief to the Court below (see P. 6, Heitmeyer's Brief, appended hereto as a part of this brief):

> "If the present record as now constituted in good faith at *great* expense is not sufficient or satisfactory, why does not the Commission enter a decision to that effect, clearly appealable under the law? It may grant or deny the application, but it must make a decision. Can the Commission avoid the entry of an appealable order by mere procedural maneuvers *without* giving some reason for their action? Can they circumvent, set aside, and negate a final judgment of an appellate tribunal by the mere maneuver of a 'further hearing,' requiring the formation of a *different* record with *new* parties and *new* issues at *great* expense without mak

ing some findings as a basis for their action? Can the Commission make a 'racket' of one's cherished American right of having a hearing, by hearing his application to death before deciding the issues? Is that the purpose of the right of appeal? Can the Commission flaunt justice in this way? Does the fact that it is a *public* agency paid with *public* funds to perform a *public* duty give it a right to disregard the simplest principle of justice, and then defend that act by referring to the 'public interest' clause of the statute? Not according to the law as stated in Morgan v. United States, cited *infra.*"

It may be added that the granting of a construction permit for a new station does not necessarily require the granting of a station license. If the Commission should find the applicant's qualifications were such as not to justify the granting of the station license when the time for acting on that application arrives it can refuse such grant at that time.

RESULT OF COMMISSION'S PLAN OF PROCEDURE.

For the respondent Heitmeyer to enter upon such a hearing would mean that he must give up his right to have a correct decision as of the date when the Commission made its erroneous and arbitrary decision which the Court reversed. It would mean, too, that he must give up that right through no fault of his own, but solely because of the Commission's erroneous and arbitrary decision.

Worse than all that, if the Court should permit the Commission to carry out its orders in this case, it would mean the establishment of an entirely new rule of procedure for quasi-judicial commissions. It would practically destroy the right of applicants ever to secure a final decision in cases where the Commission continued to make erroneous decisions.

Under such procedure, there can be no finality. Every time the Commission makes an erroneous decision and an applicant appeals and the Court reverses the Commission's

decision, all new applicants who may have filed applications during the period of the appeal would be entitled to force the Commission to set down all of the pending applications for a new hearing on a comparative basis.

If such procedure be permitted to the Federal Communications Commission, it would apply also to such governmental bodies as the Federal Power Commission in granting licenses for the development of water power sites and to the Interstate Commerce Commission in granting certificates of convenience and necessity. This would be bureaucracy and administrative red tape run wild.

CLARENCE C. DILL,
JAMES W. GUM,
Counsel for Paul R. Heitmeyer.

January, 1940.

SUPREME COURT OF THE UNITED STATES.

No. 316.—October Term, 1939.

J. Lawrence Fly, et al., Petitioners,
vs.
Paul R. Heitmeyer.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 29, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

On March 25, 1935, Heitmeyer, respondent here, applied for a permit from the Federal Communications Commission under § 319 of the Communications Act of 1934, c. 652, 48 Stat. 1089, 47 U. S. C. 319, to construct a broadcasting station at Cheyenne, Wyoming. His application and a competing one were heard by an examiner. The Commission, on May 1, 1936, denied respondent's application on the sole ground that he was financially disqualified. He appealed to the United States Court of Appeals for the District of Columbia and the Commission's decision was reversed. *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91. To proceed in conformity with this opinion, the case was remanded to the Commission.

After Heitmeyer's appeal two other applications for the same facilities were filed with the Commission. Following intermediate litigation, needless here to recount, the Commission directed that respondent's case be reopened in conjunction with the pending rival applications. Before this hearing could be had, respondent obtained from the Court of Appeals a writ of mandamus directing the Commission to restrict consideration of his application to the record originally before it. *McNinch* v. *Heitmeyer*, 105 F. (2d) 41. Because important questions of administrative law were involved, we granted certiorari. 308 U. S. —.

This case is controlled by our decision in No. 265, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, decided this day.

The only relevant difference between the two cases is that h
the Commission proposed on remand not only to reconsider r
spondent's application on oral argument with subsequently fi
rival applications, but to reopen the record and take new evidenc
on the comparative ability of the various applicants to satisfy "pu
lic convenience, interest, or necessity." But the Commission's du
was to apply the statutory standard in deciding which of the ap
plicants was to receive a permit after it fell into legal error as wel
as before. If, in the Commission's judgment, new evidence wa
necessary to discharge its duty, the fact of a previously erroneou
denial should not, according to the principles enunciated in th
Pottsville case, *ante*, bar it from access to the necessary evidenc
for correct judgment.

The judgment is reversed, with directions to dissolve the writ o
mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McREYNOLDS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.